Supreme Court of the United States

OCTOBER TERM, 1962

No. 632

MICHAEL CLEARY, PETITIONER

vs.

EDWARD BOLGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

[fol. 1]

APPENDIX TO APPELLANT'S BRIEF—Filed May 10, 1961

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EDWARD BOLGER, PLAINTIFF-APPELLEE

v.

MICHAEL CLEARY, DEFENDANT-APPELLANT

and

UNITED STATES OF AMERICA, ROBERT G. ANDERSON, Secretary of the Treasury of the United States of America, Customs Agents WILLIAM J. O'SHEA and THOMAS F. LOUGHMAN, Customs Enforcement Officers WALTER J. CONLON and JOSEPH E. PATTERSON and DOROTHY T. ZECHA, Shorthand Reporter, in charge of office of Supervising Agent of Customs, Port, of New York,
DEFENDANTS

STATEMENT UNDER RULE 15(b) (omitted in printing)

[fol. 2]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMENDED COMPLAINT

Plaintiff, by his attorney, Joseph Aronstein, for his complaint herein respectfully shows to this Court and alleges:

1. That plaintiff is a citizen of the United States of America and a resident in the Town of Keansburg, State of New Jersey.

2. Upon information and belief, that defendant, Robert G. Anderson, is the Secretary of the Treasury of the

United States of America, in charge of the Treasury Department and the Customs Service of the United States together with its agents, servants and employees are under his jurisdiction, all being agents and employees of the United States of America.

[fol. 3] 3. That on or about the 12th day of September, 1959, plaintiff while duly and legally riding in his automobile in the City, County and State of New York, was halted by Customs Enforcement Officers Walter J. Conlon and Joseph E. Patterson, both employed in the Customs Service of the United States of America.

4. That thereupon the said defendants, Walter J. Conlon and Joseph E. Patterson unlawfully and illegally took plaintiff into custody and arrested him and proceeded to make an illegal search of the automobile plaintiff had been riding as aforesaid.

5. That after the foregoing illegal seizure and search said defendants, Walter J. Conlon and Joseph E. Patterson seized plaintiff's automobile and ordered him to reenter same together with said defendant Joseph E. Patterson and to drive to an office of the United States Customs Service at 22 Stone Street, in this Southern District of the United States.

6. That plaintiff requested of said defendants, Walter J. Conlon and Joseph E. Patterson leave to telephone or otherwise communicate with his family or friends in order to procure the services of a lawyer, but such request was denied and refused and plaintiff was not permitted to make a telephone call,

7. That thereafter plaintiff having been placed in custody and arrested at about 9:15 o'clock in the forenoon of that day, was kept in custody in the aforesaid service office and another office and advised and threatened by Customs Agents and Enforcement Officers that unless he signed a document giving the said customs agents the right to go to his home and search same and take him there, they would arrest not only plaintiff, but his wife and any other occupants in his home found therein.

[fol. 4] 8. That despite plaintiff's several requests for an opportunity to use the telephone to secure a lawyer, said requests were denied and plaintiff was importuned to

sign the document hereinabove referred to and upon his refusal so to do said defendants William J. O'Shea and Thomas F. Loughman made further threats as aforesaid, placing plaintiff in fear that said threats would be executed.

9. That thereafter, under duress and fear of the aforesaid threats, plaintiff signed the paper or document as demanded by said defendants William J. O'Shea and Thomas F. Loughman and requested a copy thereof, but said William J. O'Shea and Thomas F. Loughman refused to give plaintiff a copy of said document or paper.

10. That thereafter and after plaintiff signed the aforementioned paper he was forcably taken by the defendants customs agents to his home in Keansburg, New Jersey, kept in custody, under guard and control of one of the said agents and thereupon they illegally proceeded to search his home and garage and seize property therefrom.

11. That thereupon after the aforementioned illegal search and seizure, plaintiff requested from the defendants customs agents a list of the property seized by them and removed from plaintiff's home and for a reecipt therefor, but said request was denied and plaintiff continued to be kept in custody by defendants customs agents.

12. That by continuing threats against plaintiff by defendants customs agents while plaintiff was in their custody and under arrest plaintiff was thereupon compelled under further threats and ordered to sign a paper not written in the English language, but apparently having shorthand symbols thereon, although plaintiff requested and demanded to know what he was signing.

[fol. 5] 13. That thereupon one of said defendant customs agent threatened plaintiff that he would be held in high bail by the United States Commissioner if he refused to sign the aforementioned paper with shorthand symbols thereon and plaintiff thereupon did sign said paper without knowing or understanding the contents thereof.

14. That thereupon on or about 8 o'clock in the evening of the said day, plaintiff was released from the custody of the aforesaid defendants customs agents without having been arraigned before a United States Commissioner or District Judge and informed not to move from his home,

but to keep himself available for said defendants customs agents at all times.

15. That thereafter on or about October 13, 1959, plaintiff was arrested by the Police Department of New York City and the Waterfront Commission of the State of New York, on a charge of Grand Larceny and thereafter arraigned before a New York City Magistrate on October 14, 1959, for a hearing on the Grand Larceny charge.

16. That the object which is the subject matter of the abovesaid charge of Grand Larceny is a tape recorder illegally seized by said defendant customs agents as aforementioned during the aforementioned illegal search of plaintiff's home on or about September 12, 1959.

17. Upon information and belief that said defendants customs agents or one of them propose to turn over or has turned over to the Police Department of the City of New York and the Waterfront Commission aforesaid the subject matter of the Grand Larceny charge for which plaintiff herein is being prosecuted by the State of New York as aforementioned and in addition thereto proposes to testify in the said criminal prosecution against plain-[fol. 6] tiff in a proceeding pending before the Waterfront Commission of New York Harbor, and the Courts of New York with regard to information procured by the defendants under and pursuant to and as a result of the illegal search and seizure aforementioned.

WHEREFORE, plaintiff prays for judgment as follows:

1. That the aforesaid defendants all and each of them be restrained from testifying against plaintiff as to any matter heretofore complained of herein and as to any matter learned by them as a result of the aforementioned illegal search and seizure and arrest.

2. That the defendants herein be directed to return to plaintiff the papers signed by him as hereinabove set forth and any copies thereof.

3. That defendants herein be directed to return to plaintiff any and all property seized or taken into their custody from plaintiff's home and automobile resulting from the illegal search and seizure as aforesaid.

4. That the defendants or any or all of them, their agents, servants and employees be restrained and enjoined from testifying against plaintiff herein with respect to any information received or procured by them in the course or as a result of the aforementioned search and seizure and that any such information and property procured by them or delivered by them to any person or authority be delivered to plaintiff herein.

5. And for such other and further relief as to the Court seems just and proper in the premises.

Dated, New York, N. Y.

JOSEPH ARONSTEIN,
Attorney for Plaintiff,
1650 Broadway,
New York, 19, N. Y.

[fol. 7]

IN UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

ANSWER

The defendant, Michael Cleary, for his answer to the complaint herein:

FIRST DEFENSE

Denies material allegations as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 3, 4, 5, 6, 7, 8, 9, 10 and 11.

2. Denies each and every allegation contained in paragraphs 12, 13 and 14 of the complaint, except admits that plaintiff left the headquarters of United States Customs at 201 Varick Street, New York, New York, at or about 7:00 P.M. and that defendant was not arraigned before a United States Commissioner or District Judge.

3. Admits the allegations contained in paragraphs 16 and 17 of the complaint, except denies knowledge or information sufficient to form a belief as to the truth of

the allegations that plaintiff's home was illegally searched and that a tape recorder was illegally seized.

SECOND DEFENSE

4. The Court does not have jurisdiction of the subject matter of the action, and the matter in controversy does not exceed the sum of ten thousand dollars.

[fol. 8]

THIRD DEFENSE

5. The Court does not have equitable jurisdiction to issue an injunction in the instant action.

FOURTH DEFENSE

6. The Court does not have jurisdiction to issue an injunction enjoining the production of evidence or testimony in any pending state criminal proceeding by virtue of the provisions of Section 2283 of Title 28 of the United States Code.

FIFTH DEFENSE

7. The complaint fails to state a claim upon which relief may be granted.

WHEREFORE, defendant, Michael Cleary, demands judgment dismissing the complaint, together with the costs and disbursements hereof.

WILLIAM P. SIRIGNANO,
General Counsel for the Waterfront Commission of New York Harbor and Attorney for Defendant, Michael Cleary,
Office and P. O. Address,
15 Park Row,
New York 38, New York.

[fol. 9]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil 153-182

EDWARD BOLGER, PLAINTIFF

against

UNITED STATES OF AMERICA, ROBERT G. ANDERSON, Secretary of the Treasury of the United States of America, Customs Agents WILLIAM J. O'SHEA and THOMAS F. LOUGHMAN, Customs Enforcement Officers WALTER J. CONLON and JOSEPH E. PATTERSON and DOROTHY T. ZECHA, Shorthand Reporter, in charge of office of Supervising Agent of Customs, Port of New York, and MICHAEL CLEARY,

DEFENDANTS

Civil 60-1184

EDWARD BOLGER, PLAINTIFF

against

WATERFRONT COMMISSION OF NEW YORK HARBOR and DAVID C. THOMPSON, Commissioner, and JAMES O'MALLEY, JR., Commissioner,

DEFENDANTS

Appearances:

JOSEPH ARONSTEIN, Esq., New York City, Attorney for Plaintiff.

[fol. 10]

S. HAZARD GILLESPIE, JR., Esq., United States Attorney for the Southern District of New York, Attorney for Defendants, United States of America, Robert G. Anderson, William J. O'Shea, Thomas F. Loughman, Walter J. Conlon, Joseph E. Patterson and Dorothy T. Zecha. ARTHUR V. SAVAGE, Esq., Assistant United States Attorney of Counsel.

WILLIAM P. SIRIGNANO, Esq., General Counsel and Attorney for Waterfront Commission of New York Harbor, New York City. IRVING J. MALCHMAN, Esq., of Counsel.

OPINION

BRYAN, District Judge:

Edward Bolger, the plaintiff in these two actions, is a hiring agent and longshoreman licensed by the Waterfront Commission of New York Harbor and employed on the New York waterfront.

Bolger claims that on September 12, 1959 he was arrested in the early morning by federal customs agents without a warrant and held until the evening of that day without being arraigned or even charged; that during the day his home was searched and property found there seized without warrant, and incriminating statements were extracted from him while he was under detention. He contends that the arrest, search and seizure and detention were all unlawful and in violation of his rights under the Fourth and Fifth Amendments of the Constitution and under Rules 4, 5(a) and 41 of the Federal Rules of Criminal Procedure.

In the first action, Civil No. 153-182, the defendants O'Shea and Loughman are Customs agents, and Conlon and Patterson are Customs enforcement officers who were concerned in the detention and questioning of Bolger and [fol. 11] the search and seizure. Defendant Zecha is a Customs Service shorthand reporter who took down and transcribed an incriminating statement made by Bolger during his detention. Defendant Cleary is a Waterfront Commission detective who was present when Bolger's statement was taken and at other times during his detention.

Bolger had originally named as defendants in the first action the United States and the Secretary of the Treasury. The action has been dismissed as to these defendants.

Bolger seeks an injunction restraining each of the remaining defendants from testifying, as to any evidence obtained or statements made during his detention or

secured by the search and seizure, in criminal proceedings against him now pending in the Court of Special Sessions of the City of New York, or in proceedings before the Waterfront Commission for the revocation of his longshoreman's and hiring agent's licenses. He also seeks the return of all property seized.

In the second action, Civil 60-1184, the defendants are the members of the Waterfront Commission of New York Harbor, a bi-state agency of the States of New York and New Jersey. Bolger seeks to restrain the Commission and its members from considering any evidence obtained in the course of the detention and search in the proceedings before it relating to his licenses.

Bolger brought on a motion before me for a preliminary injunction in his first action. I directed that a hearing be held before me on the facts. After that hearing had started Bolger commenced his second action against the Waterfront Commission. During the course of the hearing all parties stipulated that the hearing should be considered a final trial on the merits in both actions. The trial has been concluded and both actions are now ripe for final decision.

[fol. 12] I. The Facts

The facts as developed at the trial and as I find them to be are as follows:

In September 1959 Bolger was employed by the Cosmopolitan Line as an assistant boss of stevedores mainly acting as foreman during the loading and unloading of ships at various piers along the New York shore of the North River. He had been employed on the waterfront for 35 years. He is 54 years old, married, and lives in Keansburg, New Jersey, about an hour's drive from New York. He has had no previous trouble with the law.

September 12, 1959 was a Saturday. At about 8:00 in the morning, Bolger entered Pier 56, North River, at 14th Street, one of the piers on which he regularly worked. The pier was not being worked on that day.

Federal customs enforcement officers, Patterson and Conlon, were in a parked car about 200 yards distant. They were on the lookout for thefts from the piers and

particularly thefts of liquor which had been occurring frequently. They observed Bolger enter the deserted pier, carry a cardboard carton from it and place the carton in a car parked at the pier entrance. He then was observed to move pallets about the pier with a fork lift truck. About half an hour after he had entered the pier he got in his car and drove south. The customs officers followed in their car.

At Pier 46, North River, four blocks south, Patterson displayed his badge and ordered Bolger to pull over to the side and stop. Bolger complied and the officers parked their car in front of his. The officers ordered him out of his car and "frisked" him. It was then shortly after 8:30 a. m.

Conlon asked Bolger to show him the carton which he had carried from the pier. Bolger did so: It contained only empty soda bottles. Conlon examined several other cartons in the back of the car. They contained more empty soda bottles. He then ordered Bolger to open the [fol. 13] trunk. Again there were only empty soda bottles. Bolger was questioned about whether he had obtained any liquor from the piers. He replied that he had six or eight bottles at home which he had bought from crew members who had bought the liquor from ship's stores.

When Conlon had completed the search of the back of the car and the trunk, Patterson searched the front of the car. In the glove compartment, he found a number of spark plugs and windshield wipers. Two of the windshield wipers and six of the spark plugs were stamped "Made in England". They could have been bought here for about seven dollars.

In view of Bolger's statements about the possession of liquor obtained from crew members and the two windshield wipers and six spark plugs found in his car stamped "Made in England", the Customs officers decided to take Bolger in custody. By then it was close to 9 o'clock.

Bolger and Patterson got into Bolger's car and followed Conlon's car south. Both parked in front of Pier 42. Conlon went inside to call his superiors, Customs agents O'Shea and Loughman. Patterson took Bolger's car keys, told Bolger to remain in the car, and followed Conlon inside. When he came out a few minutes later Bolger

asked to telephone. Patterson refused but said he would be permitted to call later.

Patterson and Bolger then followed Conlon in Bolger's car to 54 Stone Street, headquarters of the Customs Enforcement Section, arriving there about half past nine. Bolger again asked Patterson to use the telephone and was again refused.

At 10 a. m. customs agents Loughman and O'Shea arrived at 54 Stone Street. At about 10:30, after some preliminary questions Bolger was taken into a separate room by O'Shea. He admitted that he had some thirty or forty bottles of liquor obtained from seamen, and additional merchandise, at his home in Keansburg. Later in [fol. 14] the interrogation Bolger signed a so-called consent to search which read as follows:

> "I, Edward Joseph Bolger, hereby authorize W. J. O'Shea and ..... Customs Agents of the Customs Agency Service, U. S. Treasury Department, to conduct a complete search of my residence located at 80 Willis Ave. Keansburg, N. J. These agents are authorized by me to take from my residence any letters, papers, materials, or other property which they may desire.
>
> "This written permission is being given by me to the above agents voluntarily and without threats or promises of any kind."

It was signed by Bolger and witnessed by O'Shea. The agents rely on this document to justify the search of Bolger's house and the seizure of property found there.

The testimony is in conflict as to the circumstances under which Bolger signed the consent.

After considering the conflicting testimony and evaluating the credibility of the witnesses, I find that Bolger refused to sign the consent to search without consulting a lawyer. The agents told him in substance that, considering the information they had already obtained, the consent form was unnecessary and they could search without it but that he might as well sign it to save them trouble. Bolger then signed the form.

Bolger had previously asked Loughman how his present difficulties would affect his longshoreman's and hiring agent's licenses issued by the Waterfront Commission. Loughman told Bolger that he had nothing to do with Waterfront Commission and could promise him nothing but that when the Waterfront Commission examined Bolger's case they would probably take his cooperation with the Customs Service into account.

[fol. 15] Shortly before 11 a. m. Patterson, Conlon, O'Shea and Bolger left 54 Stone Street in a government car for Bolger's house in Keansburg, New Jersey. They arrived about noon. Bolger's wife was there with two guests and their children who were spending the weekend. Bolger briefly explained to his wife why the agents were there. Then, at O'Shea's direction he led O'Shea to a bedroom closet where there were some seventy-five bottles of liquor. O'Shea then searched other parts of the house. During most of the search Bolger remained in the dining room with one of the other agents and Mrs. Bolger accompanied O'Shea. O'Shea removed various other items, including perfumes, gloves, handkerchiefs, linens, porcelain figurines, cloth and costume jewelry. In Mrs. Bolger's bedroom closet he found a Stenorette tape recording machine made in West Germany.

Bolger was asked if he wanted to have some lunch but said he did not. Bolger, Patterson, Conlon and O'Shea left for New York at about 2 p. m., the search having taken some two hours. They took with them all the articles which they had found in Bolger's house which they suspected were acquired illegally.

On the way back to New York they stopped for lunch. Bolger was offered food but had only a bottle of soda. This was all he had from the time he was first detained at 8:30 a. m. until he was released at 7:30 p. m. that night.

The group arrived back in New York about 4 p. m. and went directly to 201 Varick Street, headquarters of the Customs Service.

The Waterfront Commission, which worked in close cooperation with the Customs Service, had been informed of Bolger's detention.

About ten minutes after Bolger arrived at Varick Street he was questioned briefly by Machry, a Waterfront Commission detective, and was asked to show his hiring agent's and longshoreman's licensee.

[fol. 16] Loughman and Cleary, another Waterfront detective, were standing nearby. They asked Bolger to produce his key ring. Bolger told them that one of the keys was to a tool room in the basement of an apartment house on 75th Street and West End Avenue which he occasionally used to repair pier equipment. Loughman and Cleary decided to investigate this story. They drove Bolger to the basement tool room in a Waterfront Commission car, ordered Bolger to open the room and searched it. Finding nothing suspicious they return to Varick Street with Bolger about 5:45 p. m. A few minutes later he was asked if he was willing to make a statement concerning the merchandise seized from his home. Apparently he did not demur.

After telling him that he did not have to make a statement and that anything said could be used against him, he was sworn, and Loughman and O'Shea proceeded to question him. Mrs. Zacha, a Customs Service reporter, took down the questions and answers verbatim. Cleary, the Waterfront Commission detective, was present throughout the questioning and could have participated though he did not do so.

Bolger admitted that with the exception of a few items which he had bought from crew members he had found most of the merchandise taken from his house on piers where he was working and had removed it. He also said that he had found the Stenorette tape recorder "bunked" on a lighter moored at one of the piers.

At the conclusion Bolger was asked whether he had voluntarily granted permission to search his house and whether the statement was made voluntarily without "duress, threats or other form of intimidation or promise of reward." He replied that it was. The statement was transcribed but was never shown to Bolger and was unsigned.

The questioning concluded about 7 p. m. Bolger was permitted to leave at 7:20. One of the customs officers

drove him back to 54 Stone Street where his car was parked and he drove off about 7:30.
[fol. 17] Before he left he was warned to keep himself available for further questioning. However, he was not questioned further and no charges were ever lodged against him by the federal authorities.

Although a United States Commissioner was sitting in the United States Court House, a short distance away, from 11 a. m. to 1 p. m. on that day, no effort was made to bring Bolger before the commissioner, or before any of the judges of the court who might have been available. Nor was there any attempt to obtain a search warrant. At no time was counsel available to Bolger, although he indicated he wanted to consult counsel before signing the "consent" to search and, at least twice, was refused the use of a telephone. At no time was he advised of his right to arraignment, to a hearing before a commissioner, or to consult counsel.

A month later Bolger was arrested by the New York City police upon a charge of grand larceny for the theft of the Stenorette tape recorder which was among the articles seized by the customs officers at his house on September 12. This charge, now reduced to petty larceny, is scheduled for trial in the Court of Special Sessions of the City of New York. As the result of this charge the Waterfront Commission subsequently suspended temporarily Bolger's licenses as hiring agent and longshoreman. Hearings on the revocation of these licenses have been deferred until after the disposition of the larceny charge in the Court of Special Sessions. The trial in Special Sessions has been deferred pending decision of the present actions.

II. The First Action (Civil No. 153-182)

a. *Jurisdiction*

The question of jurisdiction lies at the threshold of Bolger's action against the agents of the federal Customs Service and the Waterfront Commission detective Cleary. [fol. 18] All the defendants contend that this court has no jurisdiction of the subject matter of the action. The

considerations affecting Cleary, who is employed by the Waterfront Commission will be discussed separately.

Plaintiff asserts that jurisdiction rests on Rea v. United States, 350 U. S. 214. There a federal agent had seized marijuana under a search warrant issued by a United States commissioner as authorized by Rule 41(a) of the Federal Rules of Criminal Procedure. The warrant was improperly issued under Rule 41(c) since it was insufficient on its face, no probable cause existed, and the affidavit was based on unsworn statements. Petitioner was indicted by a federal grand jury for unlawful acquisition of marijuana. The district court granted a motion to suppress the evidence as to the seized marijuana on the ground that it was obtained by an unlawful search and seizure and the federal indictment was later dismissed on the Government's action. The marijuana seized was contraband and no motion was made for its return.

Thereafter the federal narcotics agent swore to a complaint in the New Mexico State Court charging petitioner with illegal possession of marijuana in violation of state law. He was arrested on that charge and awaited trial in the state court. The case against him would have been made by testimony of the federal agent based on the unlawful search and seizure.

Petitioner brought a proceeding in the district court to enjoin the federal narcotics agent from testifying in the state court as to the narcotics obtained in the unlawful search. His application for such relief was denied by the district court and the Court of Appeals affirmed (10 Cir., 218 F. 2d 237.)

The Supreme Court held, five to four, that the motion to enjoin should have been granted. Mr. Justice Douglas, writing for the majority, said that the case did not raise constitutional questions but concerned "our supervisory [fol. 19] powers over federal law enforcement agencies" which the federal courts should exercise to prevent violations by federal agents of the Federal Rules of Criminal Procedure governing searches and seizures. He went on to say (p. 217):

"No injunction is sought against a state official. The only remedy asked is against a federal agent

who, we are told, plans to use his illegal search and seizure as the basis of testimony in the state court. To enjoin the federal agent from testifying is merely to enforce the federal Rules against those owing obedience to them."

Defendants, on the other hand, urge that the later case of Wilson v. Schnettler, 7 Cir., 275 F. 2d 932, *cert. granted* 363 U. S. 840, controls and that under it the district court has no jurisdiction over this action and may not grant the relief sought.

In the *Wilson* case petitioner had been arrested and searched without a warrant by federal narcotics agents who had seized narcotics found on his person. No federal warrant had been applied for and there was no indictment or charge against the defendant in the federal courts. He was indicted by a state grand jury and charged with unlawful possession of narcotic drugs. He brought on a motion in the state court before which his case was pending for suppression of the evidence obtained by the allegedly unlawful search and seizure, which was denied.

Petitioner then brought a proceeding in the federal district court against the federal narcotics agents based on the *Rea* case, seeking judgment declaring that his arrest and search without a warrant was in violation of his rights under the Constitution and the Federal Rules of Criminal Procedure. He also sought to impound the seized narcotics, and to enjoin the agents from testifying with respect to such evidence in the pending criminal proceedings in the state court.

[fol. 20] The Court of Appeals of the Seventh Circuit, found that the case "squarely raises the question asked by the dissenting minority in the *Rea* case [per Mr. Justice Harlan]: 'Would the Court's decision have been different had there been no search warrant at all?'" It reached the conclusion that the decision would have been different.

It reasoned that in the absence of a federal warrant and a charge against the defendant in the federal courts, the federal courts had no power to restrain a federal agent from testifying in a state criminal proceeding. The court held that "the criticized activities of these officers were not and have never been brought within the effective

sphere of federal judicial supervision" (*supra* at p. 935), and that to enjoin the federal agents from testifying in a state proceeding with respect to evidence obtained by them through unlawful search and seizure would be an unwarranted interference with state administration of criminal justice not authorized by the *Rea* case.

The leading case on non-interference by the federal courts in state criminal proceedings is Stefanelli v. Minard, 342 U. S. 117.

There the Supreme Court, per Mr. Justice Frankfurter, held that federal courts should refuse to enjoin the use in a state criminal trial of evidence obtained by state officers through unlawful search and seizure. Mr. Justice Frankfurther emphasized that the delicate balance between the states and the federal government in the enforcement of the criminal law required that such relief against state officers should be denied as a matter of discretion even if the district court had power to grant it, in view of the dangers of exposing "every state criminal prosecution to insupportable disruption". (*Supra*, at p. 123.)

The latest application of the Stefanelli v. Minard doctrine was in Pugach v. Dollinger, 2 Cir., 277 F. 2d 739, *cert. granted* 363 U. S. 836, where the Court of Appeals of this circuit, relying on the *Stefanelli* case, upheld my refusal below to enjoin the use of wiretap evidence in a [fol. 21] state prosecution which was obtained by state officers in violation of Section 605 of the Communications Act of 1934, 47 U. S. C. § 605.

I am deeply sensitive of the necessity for preserving the delicate balance between the states and the federal government in this area and of leaving to the states the enforcement of state criminal law without intervention by the federal courts. See my opinion below in Pugach v. Dollinger, 180 F. Supp. 66, and cases there cited. I am also well aware of the difficulties and dangers which would result from such intervention which were so cogently pointed out by Mr. Justice Frankfurter in the *Stefanelli* case.

The distinctions between the case at bar and the *Rea* case are much the same as those relied on in Wilson v.

Schnettler. In both the case at bar and in the *Wilson* case, as distinguished from the *Rea* case, no federal warrant had been issued or even sought, no federal criminal proceeding had ever been brought, and no federal charge had ever been laid against the petitioner. If the reasoning of Wilson v. Schnettler were valid it would have to be concluded that the *Rea* case does not authorize the proceeding at bar and that the district court should refuse to grant the relief sought to avoid undue interference with the state administration of criminal justice.

I do not agree with the reasoning of Wilson v. Schnettler and I do not follow it.

In the first place I do not see that the case at bar involves undue interference with state administration of justice under Stefannelli v. Minard. The court in the *Rea* case expressly stated that its decision did not run counter to its *Stefannelli* decision. The opinion pointed out that the district court was "not asked to enjoin state officials nor in any way to interfere with the state agencies in enforcement of state law". The only question was as to the exercise of the supervisory powers of the district courts over federal law enforcement agencies.

[fol. 22] Such powers were to be used to police the requirements of the Federal Rules of Criminal Procedure to make "certain that they are observed". The *Rea* case teaches that the federal courts have the obligation to exercise such power so as "to enforce the federal rules against those owing obedience to them".

While the Federal Rules of Criminal Procedure are primarily designed to "govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings" (Rule 1), this is not their only function. The *Rea* opinion says in so many words that the rules "prescribe standards for law enforcement" and "are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures be satisfied". "The obligation of the federal agent is to obey the Rules," and "they are designed as standards for federal agents."

The question asked by Mr. Justice Harlan in his dissent in the *Rea* case as to whether the decision would have

been different had there been no warrant at all, seems to me to have been rhetorical and to have assumed a negative answer. I disagree with the view of Wilson v. Schnettler that the answer would have been in the affirmative.

Given the premises of the *Rea* case, it does not seem to me of any controlling significance whether the federal agents conducted an unlawful search and made an unlawful seizure under a defective warrant issued by a United States Commission, or under no warrant at all. In either case they would be acting in violation of the rules governing searches and seizures. In either case they would be acting contrary to their obligation to obey such rules. In either case the federal courts would have both the power and the obligation to police the rules and to make certain they are obeyed. In either case to restrain a federal agent from testifying in a state court as to evidence so unlawfully obtained would be "merely to enforce the federal rules against those owing obedience to them".

[fol. 23] It would be an anomaly to hold that equitable relief should be granted where federal agents had made at least an attempt to obey the rules though they had secured an invalid process and that relief should be denied where the agents had flouted the rules by making no attempt to obtain a warrant at all. Such a result would leave federal agents free to act as they pleased in violation of the rights of citizens by totally ignoring their obligations to obey the rules. It would place a premium on the flouting of the rules by federal agents which is specifically condemned in the *Rea* case.

It was anomalies of this nature which recently led the Supreme Court to re-examine the validity of the so-called "silver platter" doctrine in Elkins v. United States, 364 U. S. 206. Upon such re-examination it held that evidence obtained as a result of an unreasonable search and seizure by state officers, without any involvement of federal officers, was no longer admissible in the federal courts despite long-standing precedents to the contrary. As the court said (pp. 221-2):

> "Free and open cooperation between state and federal law enforcement officers is to be commended and

> encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered."

If the grant or denial of relief under the *Rea* case depended on whether the federal agents at least attempted [fol. 24] to obey the rules by obtaining a warrant even though invalid, or flouted them entirely by obtaining no warrant at all, there would be every "inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation". (p. 222). There would be an implicit invitation to federal officers, acting in association with state officers, to violate both the federal rules and constitutional guarantees. They would be encouraged to bypass the federal courts entirely in cases where the only evidence was that which could be obtained unlawfully and to turn such evidence obtained in violation of the federal rules directly over to state law enforcement authorities and thus use the fruits of their unlawful acts.

Nor do I find anything in the *Rea* case which holds that relief was dependent on the commencement or pendency of a criminal proceeding in the federal courts. In fact, when the motion in the *Rea* case was made the criminal proceedings against the petitioner had been dismissed on motion of the government and no proceedings of any kind were pending before the district court.

The concept that the district courts have inherent power to enforce the long-standing practices embodied in the federal rules, in the absence of any criminal or other proceedings before the court, is not startling or novel. In Grant v. United States, 2 Cir., — F. 2d — (decided July 28, 1960), Judge Friendly recently had occasion to discuss the nature of a motion made under Rule 41(e) for the

suppression and return of evidence unlawfully seized which was made before any criminal proceedings had been commenced or any application had been made to the district court by the government. In the course of his opinion Judge Friendly said:

> "We have said that such a motion 'was in effect a complaint initiating a civil action.' *Lapides* v. *United States*, 215 F. 2d 253, 254 (2nd Cir., 1954); *Russo* v. *United States*, 241 F. 2d 285, 287 (2d Cir.) *cert. denied*, 355 U. S. 816 (1957), and so it is in the sense [fol. 25] with which the Court was there mainly concerned, namely, its independence from the later criminal proceeding and the consequent appealability of a final order therein under 28 U. S. C. § 1291. However, the jurisdictional grants in 28 U. S. C. §§ 1331-58 will be searched in vain for any rubric under which such a motion fails, in the absence of any allegation of jurisdictional amount that would bring it under § 1331, see *Centracchio* v. *Garrity*, 198 F. 2d 382, 385 (1st Cir. 1952), *cert. denied*, 344 U. S. 866 (1952)."

Judge Friendly went on to say, citing Judge Hough in United States v. Maresca, D. C. S. D. N. Y., 266 Fed. 713, 717, that jurisdiction over such a proceeding derives from "the inherent disciplinary power of any court" over its own officers.

As the *Rea* case makes clear, the right to relief against violation of the rules by federal agents, like the right to relief discussed in the *Grant* case, derives from inherent powers of the court. It is not dependent upon whether or not a criminal proceeding against the petitioner is pending.[1]

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[1] It may be noted that in 1957, subsequent to Rea v. United States and to Centracchio v. Garrity cited by Judge Friendly in the *Grant* case, Congress added a new subdivision 4 to Section 1343 of the Judicial Code, 28 U. S. C. § 1343, which conferred original jurisdiction on the district courts over any civil action authorized by law to be commenced by any person:

> "(4) to recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote."

There is no doubt that the Federal Rules of Criminal Procedure, in

[fol. 26] Thus I conclude that under Rea v. United States I have power to grant the relief sought and that if the record before me establishes that evidence was obtained by the defendant federal agents through an unlawful search and seizure, I have the obligation to restrain the agents from producing such evidence or testifying with respect to it in the state courts.

Thus far the discussion has centered about the evidence claimed to have been obtained by unlawful search and seizure. In addition, however, Bolger claims that he was unlawfully detained by the federal agents in violation of Rule 5(a) of the Federal Rules of Criminal Procedure, and that during such detention highly incriminating statements were obtained from him. He also seeks to enjoin the federal agents from producing such statements or from testifying about them in the state proceedings.

Rule 5(a) of the Federal Rules of Criminal Procedure provides:

> "An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

Under the familiar McNabb-Mallory rule unreasonable delay in bringing a person before a commissioner is a violation of Rule 5(a), and constitutes a wilful disobedi-

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so far as they relate to searches and seizures and to the necessity for bringing an arrested person before a commissioner without unreasonable delay, may be considered as acts of Congress providing for the protection of civil rights. See Iovino v. Waterson, 2 Cir., 274 F. 2d 41; Rea v. United States, *supra*. If any statutory authority is needed to confer on the district courts jurisdiction over actions to enforce the substantive rights held to exist in *Rea*, it may well be found in the new subdivision 4. *Cf.* generally, Douglas v. City of Jeannette, 319 U. S. 157; Hague v. C. I. O., 307 U. S. 496.

ence of law by the offending officers. Incriminating statements obtained from defendants during the period of such unlawful detention are inadmissible in federal criminal proceedings. Mallory v. United States, 354 U. S. 449; McNabb v. United States, 318 U. S. 332.

[fol. 27] Like Rule 41 dealing with searches and seizures, Rule 5(a) is a rule which federal agents are bound to obey, as the *Mallory* and *McNabb* cases make clear. If this rule is violated by federal agents the doctrine of the *Rea* case comes into play and the same principles govern as apply to evidence obtained by unlawful search and seizure in violation of Rule 41. Thus this court has the obligation to restrain federal agents from producing or testifying in state proceedings as to evidence obtained in violation of Rule 5(a), as well as of Rule 41.

b. *The violations of the Federal Rules*

We thus come to the question of whether the evidence before me establishes that the federal agents violated the Federal Rules of Criminal Procedure, and, if so, in what respects. Plaintiff complains (1) that Rule 4 was violated by his initial detention and arrest without warrant; (2) that Rule 41(a) was violated when his home in Keansburg, New Jersey, was searched without a warrant and property there seized; and (3) that Rule 5(a) was violated when the agents failed to bring him before a United States Commissioner without unnecessary delay and held him for an unreasonable length of time, without arraignment, during which time incriminating statements were extracted from him.

As in most cases where such claims are made resolution of the questions presented requires a careful evaluation of the conduct of the officers involved. See Go-Bart Co. v. United States, 282 U. S. 344; Rios v. United States, 364 U. S. 253.

1. The Initial Detention and Arrest

When Customs enforcement officers Paterson and Conlon observed Bolger leaving deserted pier 56 in the early morning of September 12, 1959 he was carrying a carton [fol. 28] which he placed in his car parked nearby. The

officers had information that liquor was being unlawfully removed from the piers and were on the lookout for such violations of law.

Under the Tariff Act of 1930, 19 U. S. C. §§ 482, 1581, custom officers are entitled to conduct searches of very broad character for merchandise introduced into the United States contrary to law. Under Section 482 they may "stop, search and examine • • • any vehicle, beast or person on which or whom he or they shall suspect there is merchandise which is subject to duty or shall have been introduced into the United States in any manner contrary to law, • • •." Section 1581 gives them authority to examine, inspect and search any vessel or vehicle and any person, package, or cargo on board and they may hail and stop such vessel or vehicle and use all necessary force to compel compliance.

The officers had reason to suspect that Bolger was unlawfully removing liquor from Pier 56 and taking it away in his car. Neither warrant nor arrest was needed to conduct a search of his automobile in these circumstances. Such a search is not unreasonable nor does it violate constitutional standards.[2] See Landau v. United States Attorney, 2 Cir., 82 F. 2d 285, *cert. denied* 298 U. S. 665; United States v. Yee Ngee How, D. C. N. D. Calif., 105 F. Supp. 517; Boyd v. United States, 116 U. S. 616.

[fol. 29] While the search of the car did not turn up any liquor, Bolger admitted to the officers that he had at his house six or eight bottles of liquor from ships' stores acquired from crew members. Such acquisition of liquor is in violation of Custom regulations and is illegal. 19

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[2] I do not pass on the question of whether the initial stopping and search of the car would have been justified in the absence of the Customs enforcement statutes. *Cf.* Henry v. United States, 361 U. S. 98, suggesting that such a search might be justified if agents observed that suspicious "packages had been taken from a terminal or from an interstate trucking platform"; Rios v. United States, 364 U. S. 253, suggesting that a car may be stopped for the legitimate "purpose of routine interrogation" and with no intent to detain the occupant "beyond the momentary requirements of such a mission" (p. 262), and that if as a result the suspect revealed facts constituting reasonable cause for arrest, he might then be lawfully arrested.

C. F. R. § 23.4; 18 U. S. C. § 545.[3] Bolger's admission that he possessed liquor illegally acquired gave the officers probable cause to believe that he had committed a crime and justified their arresting him, see Rios v. United States, 364 U. S. 253.

There is no doubt that they did so despite their insistence that they had merely "detained" him. The officers admitted that had Bolger attempted to leave they would have forcibly detained him. Arrest is not a question of semantics and this was an arrest no matter what the officers chose to call it.[4]

The arrest took place shortly after 9 a.m., immediately after the search of Bolger's car had been completed.

2. The Subsequent Detention

When the officers arrested Bolger they were commanded by Rule 5(a), F. R. Cr. P., to bring him before a Commissioner without unnecessary delay so that he could be arraigned, informed of his rights, consult with counsel, have a hearing and be admitted to bail. (Rule 5(b).) They took him to the headquarters of the Customs Enforcement Service and kept him there from about 9:30 a.m. until shortly before 11 a.m., when they started for his house at Keansburg to make the search. In the interim they questioned him, obtained further admissions about [fol. 30] merchandise in his house, and induced him to sign a form purportedly giving his consent to a search of his house. Up to that time no one had advised him of his rights, he had been refused the use of a telephone, and he had had no opportunity to communicate with his friends or relatives, or with counsel. Keansburg was an hour's drive away and it took at least two hours to get there and back, quite apart from the time necessary for a search.

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[3] Liquor bought by seamen from ship's stores cannot be transferred and is solely for the seaman's bona fide personal use. 19 C. F. R. § 23.4.

[4] See Worden v. Davis, 195 N. Y. 391; Stevens v. O'Neill, 51 App. Div. 364, aff'd 169 N. Y. 375. New York law is applicable under the rule of United States v. Di Re, 332 U. S. 581. See, also, United States v. Perez, 2 Cir., 242 F. 2d 867.

On this Saturday morning a United States Commissioner before whom Bolger could have been brought, was present at the United States Court House only a few blocks away from 11 a.m. to 1 p.m. In any event, the federal court house was open and there is always a judge sitting ex parte available on Saturday morning before whom Bolger could have been arraigned had no commissioner been available. In all probability other federal judges would have been available throughout the day.

However, no attempt whatsoever was made to arraign Bolger as the rules required. Instead he was whisked off on a trip to New Jersey 30 miles away. When the agents started on this expedition with Bolger shortly before eleven it was plain that they had no intention of arraigning him "without unnecessary delay". There was nothing voluntary about Bolger's stay in enforcement headquarters nor about his trip to New Jersey with the officers. He was told what to do and where to go and he did what he was told. He could not have been expected to do anything else under the circumstances.

While his detention at Stone Street up to 11 o'clock, when the commissioner became available at the court house, may have been justifiable, it is plain that his detention without arraignment was not justified thereafter. Instead of starting on the trip to New Jersey, which was bound to take several hours, Bolger should have been taken before the commissioner and the procedure for the protection of his rights prescribed by Rule 5 set in motion. [fol. 31] I find that Bolger's detention after the commencement of the trip to New Jersey shortly before 11 o'clock in the morning of September 12, 1959 constituted unreasonable delay in bringing him before a commissioner in violation of Rule 5(a) and that such unreasonable delay continued until he was released at 7:30 p.m., some 8½ hours later, without any charges whatsoever having been made against him.

3. The Search and Seizure

As I said in United States v. Martin, D. C. S. D. N. Y., 176 F. Supp. 262 (at pp. 266-7):

"Consent to a search may constitute a waiver of the rights secured by the Fourth Amendment: See United States v. Dornblut, 2 Cir., 261 F. 2d 949; United States v. Gross, D. C. S. D. N. Y., 137 F. Supp. 244; United States v. Reckis, D. C. D. Mass., 119 F. Supp. 687. *Cf.* United States v. Sclafani, 2 Cir., 1959, 265 F. 2d 408. However, in order for consent to constitute a waiver the burden is on the United States to show by clear and convincing evidence that it is unequivocal and specific and freely and intelligently given. United States v. Reckis, supra; United States v. Wallace, D. C. D. C., 160 F. Supp. 859. It must be affirmatively shown that there was no duress orc oercion, actual or implied. ''Invitations' to enter one's house, extended to armed officers of the law who demand entrance are usually to be considered as invitations secured by force.' Judd v. United States, 89 U. S. App. D. C. 64, 190 F. 2d 649, 651; United States v. Gross, supra; United States v. Minor, D. C. E. D. Okl., 117 F. Supp. 697.

"Mindful of this * * * "courts indulge every reasonable presumption against waiver' of fundamental constitutional rights' (Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461) * * *."

[fol. 32] The defendants here had the burden of showing by clear and convincing evidence that a consent to search "was unequivocal and specific and freely and intelligently given". I find that the defendants have failed to sustain this burden.

Bolger, already twice denied the right to telephone, and cut off from access to relatives or counsel in enforcement headquarters, had been talked to by four agents by the time he signed the consent. He had made serious admissions. He testified that he was confused and apprehensive and I believe him. He was also worried about possible repercussions which might affect his Waterfront Commission licenses under which he earned his livelihood, and had discussed such possibilities with O'Shea.

He refused to sign the consent without consulting a lawyer. He was then induced to do so on the representation by the agents that they had the right to search any-

way and, by implication at least that a lawyer would avail him nothing. This was plainly not true. If properly advised he would have known that there was no right to search without a warrant.

The consent to search and seizure without a warrant was not "unequivocal" nor was it freely and intelligently given. It did not constitute a valid waiver of Bolger's rights.

It is not necessary to have force or threat to vitiate a consent to search. Consent to search is not valid when based on misrepresentations made by government agents. Gouled v. United States, 255 U. S. 298.

I hold that the consent form which Bolger was induced to sign without benefit of counsel was void and of no effect and did not authorize the agents to search his home in New Jersey. The search conducted without a warrant, easily obtainable had the agents followed the mandate of Rule 41(a), and the seizures which resulted from the search were unlawful and in violation of Bolger's rights. Johnson v. United States, 333 U. S. 10; Amos v. United [fol. 33] States, 255 U. S. 313; United States v. Arrington, 7 Cir., 215 F. 2d 630; United States v. Minor, D. C. E. D. Okl., 117 F. Supp. 697.

The later conduct of Bolger cannot be viewed as a consent to the search. As I have said, Bolger was in the hands of the agents and was in no position to do other than what he was told to do. The fact that he did not make further protest, accompanied the agents, and was there during the search, was plainly because, having signed the consent, he believed the agents had authority to make the search and he was then prepared to make as little trouble for them as possible.

Moreover, by the time he reached his house in New Jersey, about noon, he had already been under detention for an unreasonable length of time in violation of Rule 5(a). It may well be that the McNabb-Mallory rule invalidates any consents to search by conduct or otherwise given during such a period. See Watson v. United States, D. C. Cir., 249 F. 2d 106.

4. The Incriminating Statements

At about 6 p. m. Bolger was questioned under oath by the agents before a Customs Service reporter who took a transcript of his testimony. The questioning lasted until 7:20. By the time the questioning began more than nine hours had elapsed since Bolger was first detained. At no time had he been advised of any of his constitutional or statutory rights. He had been refused the opportunity to obtain counsel. His home had been unlawfully searched and property had been unlawfully seized. He had been compelled to participate in another unlawful search. He had been under intermittent interrogation throughout the day by four agents and two Waterfront detectives and had been subjected to great strains and tensions.

[fol. 34] While Bolger had a native shrewdness he showed evidence of only a limited education. According to agent O'Shea, Bolger had admitted that he was drunk the night before and had spent the night sleeping in his car, an episode which could scarcely have left him at his best.

No attempt whatsoever had been made to bring him before a United States Commissioner in compliance with Rule 5(a) and he had been induced to sign a consent to search which was wholly invalid.

The statement taken from him between 6 and 7:20 p. m. was highly incriminating both as to the merchandise seized generally and as to the Stenorette tape-recording machine which is the subject of the pending charge in the state courts.

It needs no further discussion to demonstrate that the incriminating statement was the result of a clear violation of Rule 5(a) of the Federal Rules of Criminal Procedure by the agents and of the illegal search and seizure, and I so find. The same applies to any other incriminating statements made by him after he left with the agents for New Jersey when his unlawful detention began. See Mallory v. United States, *supra*; McNabb v. United States, *supra*.

5. Remedies Against the Federal Agents

I find (1) that on September 12, 1959 the defendant federal agents violated Rule 41(a) of the Federal Rules of

Criminal Procedure by conducting an unlawful search of the plaintiff's house and unlawfully seizing property found there without a warrant, and (2) that on September 12, 1959 such defendant agents violated Rule 5(a) of the Federal Rules of Criminal Procedure by unlawfully detaining plaintiff for an unreasonable length of time without taking him before a commissioner, and obtained incriminating statements from him as a result of such unlawful detention.

[fol. 35] I am therefore required in the exercise of the supervisory powers of this court over federal law enforcement officers, to enforce obedience to the Rules of Criminal Procedure by enjoining the defendant agents from testifying in the state criminal proceedings with respect to any evidence obtained as a result of their unlawful conduct. Defendants O'Shea, Loughman, Conlon and Patterson will therefore be enjoined from testifying in the state criminal proceedings with respect to any evidence obtained during the illegal search and seizure conducted at Bolger's house in Keansburg, New Jersey, on September 12, 1959 and from turning over to state law enforcement authorities and producing in any state criminal proceeding any property seized at Bolger's house on that day, including the Stenorette tape recording machine.

Defendants O'Shea, Loughman, Conlon and Patterson and defendant Zecha, the Customs Service reporter, will be enjoined (1) from testifying as to any statements made by the plaintiff after his departure from enforcement headquarters at 54 Stone Street shortly before 11 a. m. on September 12, 1959, including the statement in question and answer form taken from the plaintiff beginning at or about 6 p. m. on that day, and (2) from turning over the transcript of any statement or statements taken from plaintiff during such period to state law enforcement authorities or from producing such transcript in any state criminal proceedings.

Since the proceedings before the Waterfront Commission relating to the revocation of the plaintiff's licenses as longshoreman and hiring agent will also vitally affect his rights, a similar injunction will issue with respect to giving testimony or producing evidence or statements at

any hearings before that Commission. *Cf.* Burack v. State Liquor Authority, D. C. E. D. N. Y., 160 F. Supp. 161.

[fol. 36]

6. The Relief Sought Against Defendant Cleary

Defendant Cleary, who questioned Bolger briefly on his return from New Jersey, accompanied him on the search of the 75th Street house and was present throughout the taking of the question and answer statement before the Customs Service reporter between 6 and 7:20 p. m. While Cleary did not participate in the questioning he was free to do so.

Plaintiff seeks to restrain Cleary also from testifying in state proceedings as to the statement obtained from him.

Cleary, of course, is not a federal agent or employee. He is not bound to obey the Federal Rules of Criminal Procedure. He was present at the questioning as a representative of the Waterfront Commission, a bi-state agency of the States of New York and New Jersey as a result of information from the Customs Service to the Commission concerning the Bolger case. This was the result of the commendable cooperation between the Customs Service and the Commission who were both concerned with law enforcement on the waterfront.

The question of whether relief should be granted against Cleary is a difficult one. The *Rea* opinion expressly distinguished that case from Stefannelli v. Minard on the ground that no relief was asked for against state law enforcement officials. Certainly the *Stefannelli* case would preclude injunctive relief against Cleary in his capacity as a state law enforcement officer had he not been present at the taking of the statement.

But does this conclusion leave the plaintiff without remedy under the circumstances? If it did the injunction issued against the federal officers would be rendered in large part ineffective in so far as the incriminating statement made by Bolger is concerned. Cleary was present throughout that statement. No doubt he paid close attention to Bolger's admissions concerning his acquisition of the Stenorette tape-recording machine which is the subject

[fol. 37] of the state larceny charge. In effect, Cleary was a human recorder of the questions which were put to Bolger and the answers which he gave.

If no injunction can be issued against Cleary he is in a position to testify in the state court proceedings as to Bolger's admissions before the federal agents and thus to act as a vehicle to defeat the policy enunciated in the *Rea* case of protecting the privacy of the citizen against invasion in violation of the federal rules. Thus, the federal agents would be able to flout the rules and to use the fruits of their unlawful conduct in the state proceedings through the medium of Cleary.

Cleary was present at the questioning by invitation of the Customs Service. Indeed, his presence might have been an additional inducement to Bolger to answer questions more freely since Bolger had already shown concern to agent Loughman about the effect his predicament might have on his vital Waterfront Commission licenses.

In Elkins v. United States, *supra*, the Supreme Court noted that in the course "of the entirely commendable cooperation between federal and state law enforcement agencies" it was often difficult in practice to determine where federal activity ended and state activity began. The court gave as examples, Byers v. United States, 273 U. S. 28, in which evidence was excluded where the participation of a federal agent in an unlawful search by state officers was "under color of his federal office" and the search "in substance and effect was made a joint operation of the local and federal officers", (273 U. S. at 33), and Gambino v. United States, 275 U. S. 310, where evidence illegally seized by state troopers was excluded in the federal courts because the court found that "the wrongful arrest, search and seizure were made solely on behalf of the United States". (275 U. S. at 316.)

In the case at bar the wrongful activities were all those of federal officers and were conducted or directed by them. All that was done during the period of unlawful detention, [fol. 38] and particularly the taking of the incriminating statement from Bolger, was being done on behalf of the United States. Cleary was merely a witness to them. If Cleary had been a private citizen called in by the federal

agents to be a witness to incriminating statements unlawfully obtained from Bolger, he would surely not be insulated against appropriate action by the federal courts to enforce the federal rules. The fact that he was a state agent does not insulate him either or permit him to be used as a shield to enable the fdral officers to violate plaintiff's rights with impunity.

I am therefore constrained to hold that an injunction must also issue against Cleary restraining him from testifying as to any statements made by Bolger during his interrogation by the federal agents. Cleary will be restrained not in his capacity as a state official but because he participated as a witness in the unlawful acts of the federal officers acting on behalf of the United States. Such participants are properly within the orbit of the power of the federal courts to enforce the rules against the federal agents owing obedience to them. Relief against them is a necessary incident of such power which the federal courts must grant under the circumstances.

7. The Return of the Property Seized

Bolger's request for a direction that all of the property seized be returned to him is denied. The record before me indicates that most of the items seized were brought into the United States unlawfully and there is no showing that any of them are lawfully here. Probable cause exists for the institution of forfeiture proceedings. Notwithstanding any illegality in the seizure the burden is on the plaintiff to prove that the merchandise is not forfeitable. Leaving the merchandise in the custody of the Customs Service does not prejudice plaintiff's right to petition for remission from forfeiture and penalty. (19 U. S. C. §§ 615, 618.) Plaintiff has not established in this proceeding that he is [fol. 39] entitled to the return of any of the allegedly contraband seized merchandise. See Trupiano v. United States, 334 U. S. 699.

III. The Second Action (Civil 60-1184)

The second action can be rapidly disposed of. The only defendants are the Waterfront Commission and its indi-

vidual members. Bolger seeks to restrain the Commission and its members from considering in the proceedings before it relating to his license any evidence unlawfully secured.

The Commission was set up under the Waterfront Commission Act enacted by the States of New York and New Jersey in 1953. (New York, Laws, 1953, c. 882 (McK. Unconsol. Laws §6700aa and following); N. J. Laws 1953, c. 203 (N. J. S. A. 32:23-1 and following).)

Part I of the Act which encompasses the Waterfront Commission Compact, an interstate compact between the States of New York and New Jersey, was submitted to and approved by Congress. (Act of August 12, 1953, c. 407, 67 Stat. 541.)

Plaintiff asserts that there is jurisdiction to grant the relief sought under the *Rea* case because the Commission and its members are federal agents who are subject to the Federal Rules of Criminal Procedure. This contention is devoid of merit.

The Waterfront Commission is a bi-state agency of the States of New York and New Jersey. The fact that Part I of the Act was approved by Congress in no way makes it a federal agency. See Rivoli Trucking Corp. v. American Export Lines, Inc., D. C. E. D. N. Y., 167 F. Supp. 937. Rea v. United States does not authorize a proceeding to enjoin a state agency from considering evidence unlawfully obtained. Indeed, to grant such relief would run directly counter to Stefannelli v. Minard, *supra*, and Pu- [fol. 40] gach v. Dollinger, *supra*. The second action must be dismissed on the merits.

The foregoing opinion constitutes my findings of fact and conclusions of law.

A decree will be submitted in accordance with this opinion on five (5) days' notice.

Dated: New York, N. Y.

November 15, 1960

FREDERICK V. P. BRYAN
U. S. D. J.

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORDER APPEALED FROM—December 20, 1960

The plaintiff herein having served and filed his complaint demanding a permanent injunction against the above named defendants, as appears more fully by said complaint and the prayer for relief therein contained and said action and issues therein having been joined by the answer of the defendants herein, and the trial having come on before me and having been had, and after hearing the evidence adduced by the plaintiff and the defendants herein and upon due consideration thereof, it is

[fol. 41] ORDERED, ADJUDGED AND DECREED that the defendants William J. O'Shea, Thomas F. Loughman, Walter J. Conlon and Joseph E. Patterson are hereby enjoined from testifying in the State criminal proceedings with respect to any evidence obtained during the illegal search and seizure conducted at the house of Edward Bolger, plaintiff, in Keansburg, New Jersey on September 12, 1959 and from turning over to State Law Enforcement Authorities and producing in any State criminal proceeding any property seized at the house of Edward Bolger, plaintiff, on that day, including the Stenorette tape-recording machine, and it is further

ORDERED, ADJUDGED AND DECREED that the defendants William J. O'Shea, Thomas F. Loughman, Walter J. Conlon, Joseph E. Patterson and Dorothy T. Zecha are hereby enjoined from testifying as to any statements made by the plaintiff, Edward Bolger, after his departure from Enforcement Headquarters of the United States Customs at 54 Stone Street, City, County, State of New York and the Southern District of New York at about 11 o'clock A. M. on September 12, 1959, including the statement in question and answer form taken from the plaintiff beginning at about 6 o'clock P. M. on that day, and from turning over the transcript of any statement or statements taken from the plaintiff herein, Edward Bolger, during such period to State law enforcement authorities, or from

producing such transcript in any State criminal proceedings, and it is further

ORDERED, ADJUDGED AND DECREED that the defendants William J. O'Shea, Thomas F. Loughman, Walter J. Conlon, Joseph Patterson, Dorothy T. Zecha and Michael Cleary are hereby enjoined with respect to transactions and statements subsequent to 11:00 A. M. on September 12, 1959 [fol. 42] from giving any testimony or producing any statements in question and answer form, or other statements or producing any evidence before the Waterfront Commission of New York Harbor at any hearing or trial conducted by the said Waterfront Commission of New York Harbor against the said plaintiff, Edward Bolger, with respect to any statements, in question and answer form made on September 12, 1959 and producing any property illegally seized during the unlawful search of plaintiff's house at Keansburg, New Jersey on September 12, 1959, and it is further

ORDERED, ADJUDGED AND DECREED that the defendant Michael Cleary is hereby enjoined from giving any testimony or producing any evidence or statements either oral or in question and answer form obtained by him from defendants William J. O'Shea, Thomas F. Loughman, Walter J. Conlon, Joseph E. Patterson and Dorothy T. Zecha on September 12, 1959 in any State criminal proceedings against the plaintiff herein, Edward Bolger, with respect to any statements, including the statement in question and answer form while the plaintiff was illegally detained at 201 Varick Street, City, County, State of New York and the Southern District of New York on September 12, 1959, and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff Bolger's application for an order directing the return to him of the properties seized by defendants William J. O'Shea, Walter J. Conlon and Joseph E. Patterson at plaintiff's home at Keansburg, New Jersey on September 12, 1959 be and hereby is denied and that the said merchandise be retained in the possession, custody and control of the Collector of Customs of the Port of New York for disposition in accordance with the Customs Laws and Regu-

lations, but without prejudice to such further proceedings by the plaintiff with respect to such properties as may be authorized by law, and it is further

[fol. 43] ORDERED AND ADJUDGED that the defendants William J. O'Shea, Thomas F. Loughman, Walter J. Conlon, Joseph E. Patterson, Dorothy T. Zecha and Michael Cleary pay the costs of these proceedings, exclusive of plaintiff's attorney's fees, as taxed by the Clerk.

Dated: New York, N. Y., December 20, 1960.

FREDERICK V. P. BRYAN,
U. S. D. J.

Rec'd in Clerk's Office: 12/21/60.
Judgment Entered: 12/21/60.
HERBERT A. CHARLSON,
Clerk.

[fol. 44] • • • •

[fol. 45]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 402—October Term, 1960
Argued May 25, 1961

Docket No. 26826

EDWARD BOLGER, PLAINTIFF-APPELLEE

—v.—

MICHAEL CLEARY, DEFENDANT-APPELLANT

Before:

CLARK and WATERMAN, *Circuit Judges*, and
ANDERSON, *District Judge*

Appeal from the United States District Court for the Southern District of New York, Frederick van Pelt Bryan, *Judge.*

Defendant, Michael Cleary, an investigator for the Waterfront Commission of New York Harbor, appeals from an order enjoining him from testifying, in state proceedings against the plaintiff, Edward Bolger, to statements made by plaintiff during his illegal detention by federal officers, and from producing any property illegally seized during their unlawful search of plaintiff's house. [fol. 46] Opinion below reported in D. C. S. D. N. Y., 189 F. Supp. 237, *sub nom. Bolger v. United States.* Order affirmed.

IRVING MALCHMAN, Asst. to the Gen. Counsel, Waterfront Commission of New York Harbor, New York City (William P. Sirignano, Gen. Counsel, New York City, on the brief), *for appellant.*

JOSEPH ARONSTEIN, New York City, *for appellee.*

FRANK D. O'CONNOR, Dist. Atty., and Benj. J. Jacobson, Asst. Dist. Atty., Queens County, New York, *for The New York State District Attorneys Association, amicus curiae.*

OPINION—August 4, 1961

CLARK, *Circuit Judge*:

This case presents the question whether a federal court has the power to enjoin a state official from testifying in a state proceeding to information learned by him as a result of his co-operation with federal officials in an illegal search and seizure and an illegal detention.

The plaintiff, Edward Bolger, is a hiring agent and longshoreman licensed by the Waterfront Commission of New York Harbor and employed on the New York waterfront. On September 12, 1959, some federal customs enforcement officers were on the lookout for theft from the piers, and they observed the plaintiff take a cardboard carton from a deserted pier and place the carton in his car. In the course of their ensuing investigation, they searched plaintiff's New Jersey house in violation of Fed. R. Crim. P. 41, and obtained incriminating admissions from the plaintiff during a detention which violated Fed. R. Crim. P. 5(a). On the authority of *Rea* v. *United States*, [fol. 47] 350 U. S. 214, the court below enjoined the various officials involved from testifying in state proceedings to the fruits of their illegal activities. To make its decree effective, the court extended the scope of the injunction to include defendant Cleary, an investigator for the Waterfront Commission of New York Harbor. D. C. S. D. N. Y., 189 F. Supp. 237. Cleary was not present at the time of the illegal search and seizure, but, at the invitation of the Customs Service, witnessed the subsequent interrogation of the plaintiff during part of his illegal detention by federal officials. Though Cleary did not participate in the questioning, he was free to do so had he wished.

The district court enjoined Cleary from testifying, in any Waterfront Commission hearing against plaintiff, with respect to transactions and statements subsequent to 11:00 a.m. on September 12, 1959 (the time that the illegal detention and illegal search and seizure began), and from producing any property illegally seized during the illegal search of plaintiff's New Jersey house. The order also enjoined Cleary from giving any testimony or producing

any evidence in state criminal proceedings against the plaintiff with respect to statements obtained by federal officials during plaintiff's illegal detention. The present appeal is taken by defendant Cleary from that part of the district court order pertaining to him. The other defendants do not appeal, and Cleary concedes for purposes of his appeal the illegality of the conduct of the various federal officials.

Defendant's main point on this appeal is that the order below constitutes an unwarranted interference with the administration of criminal justice by the states. A federal court will not enjoin the use in state courts of evidence obtained by an unreasonable search by state police, *Stefanelli* v. *Minard*, 342 U. S. 117, or obtained by state police through violation of the Anti-Wire Tapping Act, *Pugach* v. *Dollinger*, 365 U. S. 458. On the basis of this line of [fol. 48] authority, defendant argues that the order below cannot be sustained. Defendant Cleary, an investigator for the Waterfront Commission of New York Harbor, is an official of a bistate agency of New York and New Jersey. The proceedings in which his testimony is forbidden are a state prosecution for petit larceny and a Waterfront Commission hearing to determine whether plaintiff's license as a hiring agent and his registration as a longshoreman should be revoked. It is urged that a consideration for the proper balance between the state and federal governments requires the federal court to stay its hand in the present case, lest the work of the state courts be unduly disrupted.

The answer to this contention is that the federal courts will make an exception to this principle of noninterference in order to insure that federal officers comply with the requirements of fair criminal law administration as set forth in the Federal Rules of Criminal Procedure. In *Rea* v. *United States*, *supra*, 350 U. S. 214, 217, the Supreme Court directed the district court to enjoin a federal narcotics agent from testifying in a state prosecution with respect to narcotics seized by him in an illegal search. The court could assume jurisdiction in the exercise of its "supervisory powers over federal law enforcement agencies." We think the *Rea* case compels the conclusion that

the order below was proper. In *Rea*, a federal official was disabled from passing the fruits of his illegal activities on to the state through testimony at trial. In the present case the federal officials attempted to pass the fruits of their illegal activities on to the state by calling in state officials at the time of the illegal detention. If the integrity of the judicial process stated in the Federal Rules of Criminal Procedure is not to be subverted by the former method, it must be similarly protected against subversion through the latter method. The only difference between the two cases is the time at which the federal officials [fol. 49] attempt to make the results of their lawbreaking available to the state. We do not think that this difference justifies a distinction in law, or justifies so easy a means of evading federal law for the protection of the accused.

Defendant attempts to distinguish the *Rea* case, 350 U. S. 214, 217, on the ground that, as the Supreme Court there pointed out, "no injunction [was] sought against a state official." But the defendant Cleary is not being enjoined in his capacity as a state official, but as a witness invited to observe illegal activity by federal agents. If the court can enjoin federal agents from passing on the fruits of their illegal activity to the state, the court has power to make its decree effective by extending the injunction to any third party invited by the federal agents to witness the securing of statements or other evidence. That the third party happens also to be a state official is not, in our view, an excusing circumstance.

The defendant also seeks to distinguish *Rea* on the ground that there the accused, prior to the commencement of the state prosecution, had been indicted under federal law, and had obtained a suppression order under Fed. R. Crim. P. 41(e) against use of the illegally obtained evidence in that or in any other prosecution. But the majority opinion in *Rea* nowhere relied on the existence of the prior suppression order, or the fact that a prior federal indictment had been brought. Nor can we see any rational justification for holding that the disability from giving testimony in state proceedings, based on the need to protect the integrity of the process stated in the

Federal Rules of Criminal Procedure, depends on the existence of a prior federal indictment or suppression order. Defendant contends that such a narrow construction of *Rea* is indicated by the recent Supreme Court decision in *Wilson* v. *Schnettler*, 365 U. S. 381, sustaining the dismissal of an action to enjoin federal agents from testifying in a state court and from there producing [fol. 50] narcotics seized by them. But in *Wilson* the complaint failed to allege that the seizure was illegal, and this was the basic reason for the court's failure to follow *Rea*. While the *Wilson* opinion notes that *Rea* was different in that earlier federal proceedings had occurred, the opinion declined to rely on this fact as an independent ground for distinguishing *Rea*, and ultimately rested on the insufficiency of the allegations of the complaint.

We think the *Rea* case ample authority for holding that the order appealed from is not barred by 28 U. S. C. § 2283 as an injunction to stay proceedings in a state court.

We need now to consider whether late developments may not have rendered the injunction unnecessary. When this action was pending in the court below, plaintiff had no adequate remedy in a state court, because the then prevailing doctrine of *Wolf* v. *Colorado*, 338 U. S. 25, and *Schwartz* v. *Texas*, 344 U. S. 199, permitted the states to receive evidence obtained in an unreasonable search and seizure or in violation of a federal statute. On June 19, 1961, in *Mapp* v. *Ohio*, 81 S. Ct. 1684, the Supreme Court overruled *Wolf* v. *Colorado*, *supra*, and held that state courts must exclude evidence obtained in an unreasonable search and seizure. If it were clear that *Mapp* barred all use by the state of the illegally obtained evidence here involved, the injunction below could properly be dissolved, not so much because of federal-state relations as of the traditional principle that equity will not act where there is an adequate remedy elsewhere. The scope of *Mapp* is, however, unclear in several regards, such as its application to federal statutory or rule, as well as constitutional, prohibitions or to state administrative proceedings such as those of the Waterfront Commission. Moreover, it is our understanding that a rehearing of *Mapp* is being sought, thus leaving the question still open for some

months. Hence we find no present justification for dissolving the injunction. Should the various problems left [fol. 51] unsolved by *Mapp* be clarified, so that it becomes clear that the injunction is in fact unnecessary, the district court, on application of any party in interest, may order its dissolution.

Order affirmed.

ANDERSON, *District Judge* (dissenting):

While I agree with the majority that Judge Bryan's order should be affirmed, I am of the opinion that, as a result of the intervening decision of the Supreme Court in *Mapp* v. *Ohio*, June 19, 1961, the injunction should now be dissolved. I must, therefore, dissent from that portion of the majority's decision which continues the injunction in effect.

The reason given in the majority opinion for not dissolving the injunction is that equity must act because there is no adequate remedy elsewhere, i.e., in this case, in the state court of New York; and the reason there is no remedy in the state court is that, while *Mapp* v. *Ohio* now requires state courts to exclude evidence obtained in violation of the unreasonable search and seizure provision of the Fourth Amendment, the *Mapp* case is, nevertheless, "unclear in several regards, such as its application to federal statutory or rule, as well as constitutional, prohibitions or to state administrative proceedings such as those of the Waterfront Commission." The use of the phrase "as well as constitutional" implies that *Mapp* is clear enough where the evidence sought to be used in a state court was obtained as the result of an unreasonable search and seizure. In any event, the opinion of the Court in the *Mapp* case said, "we hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." This appears to be reasonably explicit. [fol. 52] That this is also binding upon the Waterfront Commission is implicit in the Court's discussion in the *Mapp* case of the protection afforded by the Fourth Amendment to the citizens' rights to privacy. It is also

supported by civil cases to which the Fourth Amendment has been held to apply. *Rogers* v. *United States*, 97 F. 2d 691 (1st Cir. 1938); *Ex parte Jackson*, 263 Fed. 110 (D. Mont. 1920); *Schenck ex rel. Chow Fook Hung* v. *Ward*, 24 F. Supp. 776, 778 (D. Mass. 1938); *Tovar* v. *Jarecki*, 83 F. Supp. 47 (N. D. Ill. 1948). See also *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 at 392.

There is no question that in the present case Bolger's confession was procured through violations of Rule 5(a) F. R. Crim. P. *and* of the Fourth Amendment. Judge Bryan said. "It needs no further discussion to demonstrate that the incriminating statement was the result of a clear violation of Rule 5(a) of the Federal Rules of Criminal Procedure *and of the illegal search and seizure* and I so find." 189 F. Supp. at 254 (emphasis added).

As the procurement of Bolger's confession was in violation of the Fourth Amendment, the decision in *Mapp* v. *Ohio* requires the state court of New York to hold it inadmissible in evidence; Bolger, therefore, has his remedy in the state court, and the injunction issued by the court below is now unnecessary and should be dissolved.

There may be some concern lest the New York court find that the Fourth Amendment does not render the confession inadmissible here, because Cleary, the state officer, did not actually participate in the illegal search and seizure and only participated in getting the confession, by his presence, though other state agents had questioned Bolger. But it would take some lively sophistry on the evidence adduced here to find that the confession was not a fruit of the illegal search and seizure. That "fruits" are ~~proscribed~~ by the *Mapp* case is apparent from the [fol. 53] discussion on page 16 (slip sheet opinion), and by the references on p. 6 to *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920); see also *Nardone* v. *United States*, 308 U. S. 338 (1939); *Somer* v. *United States*, 138 F. 2d 790 (2d Cir. 1943).

The reasoning of the majority seems to be that, because there is a risk that the state court may not apply *Mapp* to the facts of this case, and because *Mapp* is "unclear" as to whether or not it compels the states to follow federal statutes and rules enacted to implement and preserve con-

stitutional rights, the doctrine of *Rea* v. *United States*, 350 U. S. 214 (1955) should be extended to cover a *state official* testifying in a *state court prosecution*, to preserve the integrity of federal rules and statutes.

The *Rea* case stands for the proposition that the district courts have a duty to enjoin *federal law enforcement agents* from testifying in a state court prosecution concerning evidence illegally gained. This ruling was made in a case where it was perfectly clear that the federal agent, balked by the federal rules from using the illegally gained evidence in the district court, where the evidence was suppressed, with the specific intent of using it in the state court, himself "swore to a complaint before a New Mexico judge and caused a warrant for petitioner's arrest to issue." To bring the present case within the "fall-out" area of *Rea* the majority say "the federal officials attempted to pass the fruits of their illegal activities on to the state by calling in state officials at the time of the illegal detention." This finding of intent and purpose was never made by the trial court. The most said by the trial court in its finding was, "The Waterfront Commission, which worked in close cooperation with the Customs Service, had been informed of Bolger's detention." Later in its discussion the trial court said, "He (Cleary) was present at the questioning as a representative of the [fol. 54] Waterfront Commission * * * This was the result of the commendable cooperation between the Customs Service and the Commission who were both concerned with law enforcement on the waterfront," and later, "Cleary was present at the questioning by invitation of the Customs Service." Nowhere is there anything to indicate that this invitation and cooperation was part of an evil purpose of the federal agents to "attempt to pass the fruits of their illegal activities on to the state" to promote a prosecution there, which could not be carried out in the federal court. There is nothing to show that Cleary's presence came about as the result of anything more than what the Supreme Court referred to in *Elkins* v. *United States*, 364 U. S. 206 at 221 as "* * * the entirely commendable practice of state and federal agents to cooperate with each other in the investigation and detection of criminal activity." Cleary was not present at the

confession merely as a casual by-stander or as a witness or as a "human recorder"; he was a law enforcement officer of the State of New York, present in the course of his official duties.

There was good reason at the time of the issuance of the injunction by the trial court, before the Supreme Court's holding in *Mapp* v. *Ohio*, *supra*, to include within its reach, Cleary, the state official, to prevent a violation of Bolger's constitutional rights, for Bolger then had no other recourse. To continue it now is, in effect, saying that, though the state court is now bound to protect Bolger's rights under the Fourth Amendment, *Mapp* does not make it clear that the state courts are bound to protect Bolger against a violation of Rule 5(a) F. R. Crim. P., and the federal courts must, therefore, enjoin a state agent from testifying in a state court to insure the integrity of the application of that federal rule. This, to my mind, is an unwarranted invasion of the rights and powers of the states.

[fol. 55] To attempt to base a rule on the degree or weight of the state agent's participation in a joint enforcement endeavor is wholly impractical. Either the law should be that the use in the state courts of all evidence obtained by state agents, illegally under federal rules or statutes, shall be enjoined by the district courts where, in procuring that evidence, the state agents have been assisted in whole or in part by federal agents; or the law should be that the admissiiblity of such evidence in the state courts shall be left wholly in the power of the state courts. The majority decision which leans toward the former principle means that in every case where there has been any degree of "commendable cooperation" between federal and state enforcement officers, and there are involved federal constitutional rights which the states must recognize, the states are also bound to recognize and apply federal statutes or rules of procedure, made to implement and preserve them, or have their state proceedings disrupted by a federal court's injunction, if they fail to do so. To require the states to follow and apply congressional enactments and the rules of the federal courts in this fashion would constitute a long step toward

the destruction of the division of powers. It is directly contrary to *Pugach* v. *Dollinger*, 365 U. S. 458 (1961).

Moreover, the practical consequence would be that in nearly all cases where there had been any contact at all between federal and state enforcement officers, leading to a state prosecution, a question would be raised in the district courts by means of a petition for an injunction to determine whether or not such federal statutes or rules had been complied with. Meanwhile, the district court would be compelled to stay the state court proceedings until it had had an opportunity to hear and decide the matter. It takes no major prophet to envisage the [fol. 56] "insupportable disruption" which would result. *Stefanelli* v. *Minard*, 342 U. S. 117, 123-125 (1951).

I must disagree with this extension of the holding in the *Rea* case. The plaintiff's rights under the Fourth Amendment must now, in the light of *Mapp* v. *Ohio, supra,* be protected by the courts of the State of New York. He has his remedy there, and the injunction issued by the federal court should now be dissolved.

[fol. 57]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

• • • •

Present:

HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
Circuit Judges,

HON. ROBERT P. ANDERSON,
District Judge.

EDWARD BOLGER, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS
MICHAEL CLEARY, DEFENDANT-APPELLANT

JUDGMENT—August 4, 1961

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

[fol. 58] [File endorsement omitted]

[fol. 59] Petition for rehearing in banc covering 11 pages filed August 18, 1961 omitted from this print. It was denied, and nothing more by order September 25, 1961.

[fols. 60-67] • • • •

[fol. 68]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EDWARD BOLGER, PLAINTIFF-APPELLEE

v.

MICHAEL CLEARY, DEFENDANT-APPELLANT

PER CURIAM DENYING PETITION FOR REHEARING—
September 25, 1961

Before CLARK and WATERMAN, Circuit Judges, and ANDERSON, District Judge.

On Petition for Rehearing.

William P. Sirignano, Gen. Counsel, and Irving Malchman, Ass't. to the Gen. Counsel, Waterfront Commission of New York Harbor, New York City, for petitioner-appellant Michael Cleary.

PER CURIAM:

Petition for rehearing denied.

C. E. C.
S. R. W.
U.S.C.J.J.

I dissent and vote to grant.

R. P. A.
U.S.D.J.

September 25, 1961

[fol. 69] [File endorsement omitted]

[fol. 70]

IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

• • • •

Present:

HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
Circuit Judges,

HON. ROBERT P. ANDERSON,
District Judge.

EDWARD BOLGER, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, ET AL.
MICHAEL CLEARY, DEFENDANT-APPELLANT

ORDER DENYING PETITION FOR REHEARING—
September 26, 1961

A petition for a rehearing having been filed herein by counsel for the appellant.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

[fol. 71] [File endorsement omitted]

[fol. 72]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EDWARD BOLGER, PLAINTIFF-APPELLEE

v.

MICHAEL CLEARY, DEFENDANT-APPELLANT

DENIAL OF PETITION FOR REHEARING IN BANC—
September 26, 1961

Before LUMBARD, Chief Judge, CLARK, WATERMAN, MOORE, FRIENDLY and SMITH, Circuit Judges.

On Petition for Rehearing in Banc.

William P. Sirignano, General Counsel and Irving Malchman, Assistant to the General Counsel, Waterfront Commission of New York Harbor, New York City, for petitioner-appellant Michael Cleary.

Judges Lumbard, Moore and Friendly having voted to grant the application, and Judges Clark, Waterman and Smith having voted to deny, the application is denied for lack of a majority in favor of the application.

/s/ J. EDWARD LUMBARD
Chief Judge

26 September 1961

[fol. 73] [File endorsement omitted]

[fol. 74]

IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

* * * *

Present:

HON. J. EDWARD LUMBARD, Chief Judge,
HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

EDWARD BOLGER, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS
MICHAEL CLEARY, DEFENDANT-APPELLANT

ORDER DENYING PETITION FOR REHEARING IN BANC—
September 26, 1961

A petition for a rehearing in banc having been filed herein by counsel for the appellant.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

[fol. 75] [File endorsement omitted]

[fols. 76-79] * * * *

[fol. 80]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD BOLGER, PLAINTIFF-APPELLEE

v.

MICHAEL O'LEARY, DEFENDANT-APPELLANT

and

UNITED STATES OF AMERICA, ROBERT G. ANDERSON, Secretary of the Treasury of the United States of America, Customs Agents WILLIAM J. O'SHEA and THOMAS F. LOUGHMAN, Customs Enforcement Officers WALTER J. CONLON and JOSEPH E. PATTERSON and DOROTHY T. ZECHA, Shorthand Reporter, in charge of office of Supervising Agent of Customs, Port of New York,

DEFENDANTS

DENIAL OF MOTION FOR LEAVE TO REFILE PETITION FOR REHEARING IN BANC—October 20, 1961

William P. Sirignano, New York, N. Y., for appellant.

All the active judges concurring, the motion is denied.

/s/ J. EDWARD LUMBARD
Chief Judge

October 20, 1961

[fol. 81] [File endorsement omitted]

[fol. 82]

IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

* * * * *

Present:

HON. J. EDWARD LUMBARD, Chief Judge,
HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
Circuit Judges.

EDWARD BOLGER, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS
MICHAEL CLEARY, DEFENDANT-APPELLANT

ORDER DENYING MOTION FOR LEAVE TO REFILE PETITION FOR REHEARING IN BANC—October 20, 1961

A motion having been made herein by counsel for the appellant Michael Cleary for leave to refile a petition for rehearing in banc,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

A. DANIEL FUSARO
Clerk

[fol. 83] [File endorsement omitted]

[fol. 84] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 85]

SUPREME COURT OF THE UNITED STATES

No. 632, October Term, 1961

MICHAEL CLEARY, PETITIONER

vs.

EDWARD BOLGER

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—February 19, 1962

ON CONSIDERATION of the motion of respondent for leave to proceed in forma pauperis,

IT IS ORDERED by this Court that the said motion be and it is hereby, granted.

[fol. 86]

SUPREME COURT OF THE UNITED STATES

No. 632, October Term, 1961

MICHAEL CLEARY, PETITIONER

vs.

EDWARD BOLGER

ORDER ALLOWING CERTIORARI—February 19, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1962 639776 1/3

Supreme Court of the United States

OCTOBER TERM, 1961

No. ... 57

MICHAEL CLEARY,

Petitioner,

and.

UNITED STATES OF AMERICA, ROBERT G. ANDERSON, Secretary of the Treasury of the United States of America, Customs Agents WILLIAM J. O'SHEA and THOMAS F. LOUGHMAN, Customs Enforcement Officers WALTER J. CONLON and JOSEPH E. PATTERSON and DOROTHY T. ZECHA, Shorthand Reporter, in charge of office of Supervising Agent of Customs, Port of New York,

Defendants,

v.

EDWARD BOLGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM P. SIRIGNANO,
General Counsel, Waterfront Commission of New York Harbor, and Attorney for Petitioner,
15 Park Row,
New York 38, N. Y.

Of Counsel:

IRVING MALCHMAN,
Assistant to the General Counsel.

Dated: December 22, 1961.

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Cases:

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

MICHAEL CLEARY,

Petitioner,

and

UNITED STATES OF AMERICA, ROBERT G. ANDERSON, Secretary of the Treasury of the United States of America, Customs Agents WILLIAM J. O'SHEA and THOMAS F. LOUGHMAN, Customs Enforcement Officers WALTER J. CONLON and JOSEPH E. PATTERSON and DOROTHY T. ZECHA, Shorthand Reporter, in charge of office of Supervising Agent of Customs, Port of New York,

Defendants,

v.

EDWARD BOLGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on August 4, 1961 (R.57a).

Opinions Below

The opinion of the District Court (R.9a-40a), is reported in 189 F. Supp. 237. The opinion of the Court of Appeals (R.45a-56a), printed in Appendix A hereto, *infra*, pages 15-24, is reported in 293 F. 2d 368.

Jurisdiction

The judgment of the Court of Appeals was entered on August 4, 1961 (R.57a; p. 28, *infra*).

Petition for rehearing *in banc* was denied on September 25, 1961, by the same panel of the Court of Appeals as originally sat on the instant case (R.68a). Then, the Court of Appeals, sitting *in banc*, divided three-to-three on the petition for rehearing and accordingly denied rehearing on September 26, 1961, for lack of a majority in favor thereof (R.72a).

An application by petitioner for leave to refile his petition for rehearing *in banc* was denied by all the active judges of the Court of Appeals on October 20, 1961 (R.80a-82a).

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Whether it was an improvident exercise of federal equitable power to enjoin petitioner, a state officer, from testifying or producing any evidence against respondent in both a state criminal and a state administrative proceeding against respondent (both of which state proceedings had been instituted and were pending at the time the instant suit was commenced) simply because petitioner was present (but did not participate) in an interrogation of respondent by federal customs officers while respondent was illegally detained by the federal customs officers, which detention followed an illegal search and seizure of respondent's home by the federal customs agents (at which search and seizure petitioner was not even present).

2. Whether such injunction was prohibited by the provisions of Section 2283 of Title 28 of the United States Code.

Statutes Involved

Section 2283 of Title 28, which is directly involved herein, provides as follows:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Statement

The order of the District Court herein (R.40a-43a) enjoins petitioner, a state officer (*i.e.*, an investigator for the Waterfront Commission of New York Harbor) from testifying or producing any evidence against plaintiff (1) in a criminal proceeding pending against respondent in the Court of Special Sessions of the City of New York for petit larceny and (2) in a hearing pending against respondent before the Waterfront Commission to determine whether to revoke respondent's license as a hiring agent and respondent's registration as a longshoreman. Both the state criminal prosecution and the Commission's hearing had been instituted and were pending at the time the instant suit for an injunction was commenced in the District Court (R.5a-6a; complaint, pars. 15-17).

The facts, as found by the District Court (Bryan, J.), after trial, are as follows. Respondent is a hiring agent and longshoreman, licensed and registered, respectively, as such by the Waterfront Commission and he is employed on the New York waterfront (R.10a). On Saturday morning, September 12, 1959, at about 8:30 A.M., certain federal customs officers* who were on the lookout for thefts from

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* The term federal customs "officers" is used in this petition to include all the defendants below who are employees of the United States Customs, except the shorthand reporter.

the piers, particularly thefts of liquor, observed respondent take a cardboard carton from a deserted pier and place the carton in his car (R.12a). Upon a search of both respondent's person and his car, the customs officers found in respondent's car two windshield wipers and six spark plugs stamped "Made in England" (R.12a-13a). In addition, respondent, when questioned, said that he had six or eight bottles of liquor at home which he had bought from crew members (R.13a). At about 9:00 A.M. the customs officers decided to take respondent into custody (R.13a). (The District Court found that the initial arrest and search were legal (R.27a-29a)).

Respondent was taken to an office of Customs in New York City and, after some preliminary questions, he admitted that he had some thirty or forty bottles of liquor obtained from seamen, and additional merchandise, at his home in Keansburg, New Jersey (R.13a). Later in the interrogation, respondent signed a written consent to a search of his home (R.13a-14a), which the District Court found to be void and of no effect (R.31a-32a).

Shortly before 11:00 A.M. the customs officers, together with respondent, left New York in a government car for respondent's house in Keansburg, New Jersey, where they arrived about noon (R.15a). A search was made of respondent's house for about two hours, during which certain apparently contraband merchandise was found (R.15a). (The District Court found that a United States Commissioner was in attendance at the United States Court House a few blocks away from the office of Customs from about 11:00 A.M. to 1:00 P.M. (R.17a).)

The federal customs officers, together with respondent, left Keansburg, New Jersey, at about 2:00 P.M. and they arrived at one of the offices of Customs in New York City at about 4:00 P.M. (R.15a). The Waterfront Commission, which worked in close cooperation with Customs, had been informed of respondent's detention (R.15a). Petitioner,

who was present at the Customs office upon respondent's return from his home, ascertained that respondent had a key to the basement of an apartment house in New York City which respondent occasionally used to repair pier equipment (R.16a). Petitioner and a customs officer drove respondent to the basement tool room which was searched without finding anything (R.16a). Petitioner and the customs officer then returned with respondent to the office of Customs at about 5:45 P.M. (R.16a). (Since no incriminating evidence was found in this search, it is not a factor in the decision herein.)

Respondent was then asked if he was willing to make a statement concerning the merchandise seized from his home (R.16a). Respondent was told that he did not have to make such a statement and that anything said could be used against him (R.16a). Respondent apparently did not object and he was sworn and questioned before a customs shorthand reporter (R.16a). Petitioner, who was present, did not participate in the questioning (R.16a). During the course of this questioning, respondent made some incriminating statements (R.16a). The questioning concluded at about 7:00 P.M. and respondent was permitted to leave at about 7:20 P.M. (R.16a).

The District Court found that respondent's house had been illegally searched and that property had been illegally taken therefrom by the federal customs officers; that, after such illegal search and seizure, respondent had given a highly incriminating statement before a customs reporter while illegally detained (after 11:00 A.M.) by the customs officers without being brought before a United States Commissioner (who was in attendance nearby from 11:00 A.M. to 1:00 P.M.); that the detention and search and seizure were illegal by virtue of being violative of Rules 5(a) (prompt arraignment) and 41 (issuance of warrant for search and seizure), respectively, of the Federal Rules of Criminal Procedure; and that respondent's statement resulted from both the illegal detention and the illegal search and seizure (R.29a-34a).

The District Court issued an injunction prohibiting the federal customs officers and also the customs shorthand reporter in effect from testifying or producing any evidence in any state proceeding against respondent (R.34a-35a; 40a-43a). The District Court granted this injunction in the exercise of its supervisory powers over federal law enforcement agents (R.35a). (The defendants herein originally included the United States of America and Robert G. Anderson, Secretary of the Treasury; the action as against these defendants was dismissed upon motion before trial (R.11a).)

With respect to petitioner, the District Court made the following findings (R.37a-38a):

> "In the case at bar the wrongful activities were all those of federal officers and were conducted or directed by them. All that was done during the period of unlawful detention, and particularly the taking of the incriminating statement from Bolger, was being done on behalf of the United States. Cleary [petitioner] was merely a witness to them . . ."

However, the District Court granted a similar injunction against petitioner (R.40a-43a). The ground for the injunction against petitioner was that it is necessary in order to effectuate, and as an incident to, the injunction against the federal customs officers because petitioner "participated as a witness in the unlawful acts of the federal officers acting on behalf of the United States" (R.38a). (Respondent also instituted a second injunction action against the Commission, itself, and its two members, which the District Court dismissed (R.39a-40a).)

Petitioner appealed to the Court of Appeals. While a notice of appeal was filed on behalf of the federal customs officers and the customs shorthand reporter, this appeal was dismissed pursuant to stipulation.

By judgment and decision dated August 4, 1961, the Court of Appeals affirmed the District Court by a split vote (R.45a-57a). This decision was rendered by a panel comprised of Circuit Judges Clark and Waterman and also District Judge Anderson (who dissented).

Petitioner filed a petition for rehearing *in banc* dated August 18, 1961 (R.59a-67a). On September 25, 1961, this petition for rehearing was denied by the original panel of the Court of Appeals, Circuit Judges Clark and Waterman voting to deny the petition and District Judge Anderson voting to grant the petition (R.68a). Then, on September 26, 1961, the Court of Appeals entered the following decision with respect to petitioner's petition for rehearing *in banc* (R.72a).

> "Judges Lumbard, Moore and Friendly having voted to grant the application, and Judges Clark, Waterman and Smith having voted to deny, the application is denied for lack of a majority in favor of the application."

Subsequently, by application dated October 10, 1961, petitioner applied for leave to refile his petition for rehearing *in banc* so as to give the newly appointed Judges of the Court of Appeals an opportunity to vote upon the matter (Circuit Judges Hays, Kaufman and Marshall) (R.76a-78a). This application was denied by order of the Court of Appeals dated October 20, 1961, "[a]ll the active judges concurring" (including Judge Kaufman) (R.80a-82a).

Reasons for Granting the Writ

I

The 2-1 decision by the court below (which upon petition for rehearing *in banc* divided 3-3) reflects the confusion and conflict existing in the lower federal courts over the

propriety of federal injunctive interference with state criminal (and administrative) proceedings to enjoin the use of evidence allegedly obtained in violation of federal law. Such confusion and conflict upon questions of paramount importance to federal-state relationships in the area of law enforcement insistently call for resolution by this Court.

A. The decision by the court below is in conflict with the applicable decisions of this Court. In *Stefanelli* v. *Minard*, 342 U. S. 117, suit was brought under the Civil Rights Act to enjoin the use in a criminal trial in the State of New Jersey of evidence obtained by New Jersey Police in a search and seizure which, if made by federal officers, would concededly have violated the Fourth Amendment. This Court, however, declined to decide whether the complaint stated a cause of action under the Civil Rights Act but instead held that an exercise of federal equitable jurisdiction in such circumstances would be improper, stating in substance that a proper accommodation between federal equitable power and state administration of its own law required that "the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure" (342 U. S., at p. 120) and that "[i]f we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption" (342 U. S., at p. 123).

Stefanelli was followed by the decisions of this Court in *Rea* v. *United States*, 350 U. S. 214 and *Wilson* v. *Schnettler*, 365 U. S. 381. In the recent decision in Wilson, this Court refused to enjoin federal narcotics agents from testifying and producing evidence in a state criminal proceeding. The Court distinguished its previous decision in the *Rea* case wherein it did so enjoin testimony by a federal narcotics agent, because in *Rea* the illegal search and seizure evidence had been ordered suppressed in a

prior federal criminal prosecution against the same criminal defendant, the effect of the suppression order being that the suppressed property "shall not be admissible in evidence at any hearing or trial" and because in *Rea* the motion to enjoin was thus made "to prevent the thwarting of the federal suppression order." *Wilson* v. *Schnettler*, *supra*, 350 U. S. at page 387.

This Court held in *Wilson* that the complaint therein had been properly dismissed upon the alternative grounds (1) that, though the complaint alleged that the arrest was made without a warrant, there was no allegation that the arrest was made without probable cause and (2) that there was no federal equitable jurisdiction to interfere with the state criminal proceeding for the reasons enumerated in *Stefanelli*. However, the basic premise of the decision herein by the court below is that this Court's decision in *Wilson* rested *solely* upon ground that the complaint failed to allege that the seizure was illegal. If this were true, then plaintiff therein, by hypothesis, had no basis whatever for being in federal court; his complaint was dismissible out of hand; and there was no need to discuss and distinguish, as this Court did at length, its prior opinion in the *Rea* case. Further, this Court in *Wilson* plainly and explicitly stated that it was not resting solely on the defectiveness of the complaint but also upon the principles previously enunciated in *Stefanelli*, that is, that the federal courts should not interfere by injunction with state criminal proceedings because of a claimed violation of constitutional rights (365 U. S. at pp. 385-86).

Hence, *Wilson* makes crystal clear that the decision in *Rea* is narrowly limited to particular facts therein and that the principle laid down by this Court in *Stefanelli* remains unimpaired and retains its full vitality. In fact, where, as here, the federal writ is sought against a state officer, the principle of *Stefanelli* becomes applicable even with greater force than where federal officers, as in the *Wilson* case, are the persons sought to be enjoined.

That the instant case does not warrant federal equitable interference with a state criminal prosecution follows from the recent decision by this Court in *Pugach* v. *Dollinger*, 365 U. S. 458. In *Pugach*, a federal injunction against the use of state wiretap evidence in a state criminal prosecution was denied by this Court in a short *per curiam* opinion citing *Stefanelli*.

The policy expressed by this Court in *Stefanelli* against federal judicial interference with state criminal proceedings is reinforced by the recent decision by this Court in *Mapp* v. *Ohio*, 367 U. S. 643, holding that the state courts are constitutionally required to exclude illegal search and seizure evidence. For now of course there is less reason that equity interfere with the proceeding at law. If respondent's rights under the *Mapp* rule are violated, relief is available in the state proceeding and, further, appropriate review is also available in this Court. Consequently, respondent should be remanded to the usual and time-honored remedies at law in the state courts. In this connection, the Court of Appeals of the State of New York has recently held (November 30, 1961) that the *Mapp rule* excluding evidence obtained by an unreasonable search and seizure is to applied even to pre-*Mapp* convictions if an appeal were pending at the time of the decision in *Mapp* by this Court. *People of the State of New York* v. *Loria*, New York Law Journal, page 1, col. 1, December 18, 1961.

The principle laid down in *Stefanelli* is equally applicable to a hearing by state law enforcement agency such as the Waterfront Commission. The Commission is charged with the task of eliminating racketeering and other evils on the New York waterfront. See, generally, *DeVeau* v. *Braisted*, 363 U. S. 444. Accordingly, no valid distinction can be drawn, insofar as *Stefanelli* is concerned, between the state criminal prosecution pending in the New York courts and the hearing pending before the Commission. In fact, both are simply different

aspects of related state action. Further, upon established principles of administrative law, respondent's application to enjoin petitioner's testimony before the Commission is premature since he must first exhaust his administrative remedies. E.g., *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. In this connection, the provisions in the Waterfront Commission Compact (McK. Unconsol. Laws 9851), approved by Congress, that the Commission is subject to judicial review by a proceeding instituted in either state in the manner provided by the laws of such state for review of "the *final* decision or action of administrative agencies of such state" should be dispositive.

B. Moreover, the decision herein is squarely in conflict with the decision by the Seventh Circuit in the *Wilson* case (275 F. 2d 932). Whatever may have been the ground of affirmance by this Court in *Wilson*, it is clear that the Seventh Circuit did not rest its decision upon the failure of the complaint to allege that the arrest was made without probable cause, for this fact was not even adverted to by the Seventh Circuit. Accordingly, it is patent that the Seventh Circuit would *a fortiori* have refused to issue an injunction in the instant case against petitioner, a *state* officer, and that a conflict exists between the decision herein and the decision by the Seventh Circuit in *Wilson*, which has not been resolved to the satisfaction of the court below by this Court's subsequent decision in *Wilson*.

Indeed, the court below is itself in even conflict herein. For, as noted, the court below, sitting *in banc*, divided three-to-three upon petitioner's petition for rehearing and accordingly denied rehearing "for lack of a majority in favor of the application" (R. 72a). And if we count the District Court (Bryan, J.) and District Judge Anderson who sat on the original panel of the Court of Appeals, the judges herein divided four-to-four.

Apart from the propriety of federal equitable interference with state proceedings, there is also a conflict

in decision as to whether the Federal Rules of Criminal Procedure have the effect of independent substantive law enforcible as such notwithstanding the fact that no federal criminal prosecution has ever been instituted. The decision below holds that the Federal Rules do have such independent force, while the Seventh Circuit held explicitly to the contrary in the decision in *Wilson* (275 F. 2d 932, 935).

C. Insofar as we are aware, the decision herein is completely without precedent. It constitutes the first time, to our knowledge, that a federal court has ever enjoined a *state* official from testifying in a state criminal proceeding. Stated more broadly, the decision herein constitutes the first time, to our knowledge, that a federal court has ever interfered by injunction with *state* conduct of a state criminal proceeding.

The importance of the decision herein to federal-state relationships is self-evident. As stated by Judge Anderson in his dissenting opinion (*infra*, p. 24):

> "Moreover, the practical consequence [of the decision herein] would be that in nearly all cases where there had been any contact at all between federal and state enforcement officers, leading to a state prosecution, a question would be raised in the district courts by means of a petition for an injunction to determine whether or not such federal statutes or rules had been complied with. Meanwhile, the district court would be compelled to stay the state court proceedings until it had had an opportunity to hear and decide the matter. It takes no major prophet to envisage the 'insupportable disruption' which would result. *Stefanelli* v. *Minard*, 342 U. S. 117, 123-125 (1951)."

A question of this importance fully warrants, we respectfully submit, review by this Court.

II

The District Court based federal jurisdiction herein upon the Civil Rights Act (R. 25a). There is a conflict of decision in the federal courts as to whether a suit under the Civil Rights Act comes within the exception of Section 2283 of Title 28 of the United States Code (*supra*, p. 3) prohibiting an injunction to stay state court proceedings "except as expressly authorized by Act of Congress".

Section 2283 expresses a long-standing rule of comity, for its "a limitation of the power of the federal courts dating almost from the beginning of our history in expressing an important Congressional policy—to prevent needless friction between state and federal courts". *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4, 8-9. Further, the prohibition in Section 2283 is against a stay of "proceedings" in a state court, a term which is "comprehensive" and which "includes all steps which may be taken in the state court or by its officers from the institution to the close of the final process". *Hill* v. *Martin*, 296 U. S. 393, 403. Since the order below has the effect of effectively preventing New York from prosecuting respondent, it follows that the order below is within the interdiction of Section 2283.

The court below on this issue simply stated that the decision by this Court in *Rea* was "ample authority for holding that the order appealed from is not barred by 28 U.S.C. § 2283" (*infra*, p. 18). But, as noted, in *Rea*, the motion to enjoin was made "to prevent the thwarting of the [prior] federal suppression order" therein. *Wilson* v. *Schnettler, supra*, 350 U. S. at page 387. Accordingly, the injunction in *Rea* was clearly ancillary to the prior suppression order and therefore came within the express exception of Section 2283 prohibiting a stay of state court proceedings by a federal court "except . . . where necessary . . . to protect or effectuate its judgments", the term "judgment"

encompassing interlocutory as well as final orders. *Sperry Rand Corporation* v. *Rothlein*, 288 F.2d 245, 248-49 (2nd Cir. 1961).

There remains the question whether a suit under the Civil Rights Act is subject to the prohibition of Section 2283. This question, as noted, has engendered a conflict in decision, some decisions holding that the Civil Rights Act is not within this exception to Section 2283, *Smith* v. *Village of Lansing*, 241 F.2d 856 (7th Cir. 1957); *Island Steamship Lines, Inc.* v. *Glennon*, 178 F. Supp. 292 (D. Mass. 1959), while others are to the contrary: E.g., *Copper* v. *Hutchinson*, 184 F.2d 119, 124 (3rd Cir. 1950); *International Longshoremen's & Warehouse Union* v. *Ackerman*, 82 F. Supp. 65, 106-112 (D. Hawaii 1948), rev'd upon another ground, 187 F.2d 860, cert den., 342 U. S. 859. This is another conflict in decision which requires resolution by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the instant petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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Dated: December 22, 1961.

APPENDIX A

Opinion of the Court of Appeals

(Decided August 4, 1961)

Before

CLARK and WATERMAN, *Circuit Judges*, and ANDERSON, *District Judge*.

CLARK, *Circuit Judge*:

This case presents the question whether a federal court has the power to enjoin a state official from testifying in a state proceeding to information learned by him as a result of his co-operation with federal officials in an illegal search and seizure and an illegal detention.

The plaintiff, Edward Bolger, is a hiring agent and longshoreman licensed by the Waterfront Commission of New York Harbor and employed on the New York waterfront. On September 12, 1959, some federal customs enforcement officers were on the lookout for thefts from the piers, and they observed the plaintiff take a cardboard carton from a deserted pier and place the carton in his car. In the course of their ensuing investigation, they searched plaintiff's New Jersey house in violation of Fed. R. Crim. P. 41, and obtained incriminating admissions from the plaintiff during a detention which violated Fed. R. Crim. P. 5(a). On the authority of *Rea* v. *United States*, 350 U. S. 214, the court below enjoined the various officials involved from testifying in state proceedings to the fruits of their illegal activities. To make its decree effective, the court extended the scope of the injunction to include defendant Cleary, an investigator for the Waterfront Commission of New York Harbor. D. C. S. D. N. Y., 189 F. Supp. 237. Cleary was not present at the time of the illegal search and seizure, but, at the invitation of the Customs Service, witnessed the subsequent interrogation of the plaintiff during part of his illegal detention by federal officials. Though Cleary did not

participate in the questioning, he was free to do so had he wished.

The district court enjoined Cleary from testifying, in any Waterfront Commission hearing against plaintiff, with respect to transactions and statements subsequent to 11:00 a.m. on September 12, 1959 (the time that the illegal detention and illegal search and seizure began), and from producing any property illegally seized during the illegal search of plaintiff's New Jersey house. The order also enjoined Cleary from giving any testimony or producing any evidence in state criminal proceedings against the plaintiff with respect to statements obtained by federal officials during plaintiff's illegal detention. The present appeal is taken by defendant Cleary from that part of the district court order pertaining to him. The other defendants do not appeal, and Cleary concedes for purposes of his appeal the illegality of the conduct of the various federal officials.

Defendant's main point on this appeal is that the order below constitutes an unwarranted interference with the administration of criminal justice by the states. A federal court will not enjoin the use in state courts of evidence obtained by an unreasonable search by state police, *Stefanelli* v. *Minard*, 342 U. S. 117, or obtained by state police through violation of the Anti-Wire Tapping Act, *Pugach* v. *Dollinger*, 365 U. S. 458. On the basis of this line of authority, defendant argues that the order below cannot be sustained. Defendant Cleary, an investigator for the Waterfront Commission of New York Harbor, is an official of a bistate agency of New York and New Jersey. The proceedings in which his testimony is forbidden are a state prosecution for petit larceny and a Waterfront Commission hearing to determine whether plaintiff's license as a hiring agent and his registration as a longshoreman should be revoked. It is urged that a consideration for the proper balance between the state and federal governments requires the federal court to stay its hand in the present case, lest the work of the state courts be unduly disrupted.

The answer to this contention is that the federal courts will make an exception to this principle of noninterference in order to insure that federal officers comply with the requirements of fair criminal law administration as set forth in the Federal Rules of Criminal Procedure. In *Rea* v. *United States, supra*, 350 U. S. 214, 217, the Supreme Court directed the district court to enjoin a federal narcotics agent from testifying in a state prosecution with respect to narcotics seized by him in an illegal search. The court could assume jurisdiction in the exercise of its "supervisory powers over federal law enforcement agencies." We think the *Rea* case compels the conclusion that the order below was proper. In *Rea*, a federal official was disabled from passing the fruits of his illegal activities on to the state through testimony at trial. In the present case the federal officials attempted to pass the fruits of their illegal activities on to the state by calling in state officials at the time of the illegal detention. If the integrity of the judicial process stated in the Federal Rules of Criminal Procedure is not to be subverted by the former method, it must be similarly protected against subversion through the latter method. The only difference between the two cases is the time at which the federal officials attempt to make the results of their lawbreaking available to the state. We do not think that this difference justifies a distinction in law, or justifies so easy a means of evading federal law for the protection of the accused.

Defendant attempts to distinguish the *Rea* case, 350 U. S. 214, 217, on the ground that, as the Supreme Court there pointed out, "no injunction [was] sought against a state official." But the defendant Cleary is not being enjoined in his capacity as a state official, but as a witness invited to observe illegal activity, by federal agents. If the court can enjoin federal agents from passing on the fruits of their illegal activity to the state, the court has power to make its decree effective by extending the injunction to any

third party invited by the federal agents to witness the securing of statements or other evidence. That the third party happens also to be a state official is not, in our view, an excusing circumstance.

The defendant also seeks to distinguish *Rea* on the ground that there the accused, prior to the commencement of the state prosecution, had been indicted under federal law, and had obtained a suppression order under Fed. R. Crim. P. 41(e) against use of the illegally obtained evidence in that or in any other prosecution. But the majority opinion in *Rea* nowhere relied on the existence of the prior suppression order, or the fact that a prior federal indictment had been brought. Nor can we see any rational justification for holding that the disability from giving testimony in state proceedings, based on the need to protect the integrity of the process stated in the Federal Rules of Criminal Procedure, depends on the existence of a prior federal indictment or suppression order. Defendant contends that such a narrow construction of *Rea* is indicated by the recent Supreme Court decision in *Wilson* v. *Schnettler*, 365 U. S. 381, sustaining the dismissal of an action to enjoin federal agents from testifying in a state court and from there producing narcotics seized by them. But in *Wilson* the complaint failed to allege that the seizure was illegal, and this was the basic reason for the court's failure to follow *Rea*. While the *Wilson* opinion notes that *Rea* was different in that earlier federal proceedings had occurred, the opinion declined to rely on this fact as an independent ground for distinguishing *Rea*, and ultimately rested on the insufficiency of the allegations of the complaint.

We think the *Rea* case ample authority for holding that the order appealed from is not barred by 28 U.S.C. § 2283 as an injunction to stay proceedings in a state court.

We need now to consider whether late developments may not have rendered the injunction unnecessary. When this

action was pending in the court below, plaintiff had no adequate remedy in a state court; because the then prevailing doctrine of *Wolf* v. *Colorado*, 338 U. S. 25, and *Schwartz* v. *Texas*, 344 U. S. 199, permitted the states to receive evidence obtained in an unreasonable search and seizure or in violation of a federal statute. On June 19, 1961, in *Mapp* v. *Ohio*, 81 S. Ct. 1684, the Supreme Court overruled *Wolf* v. *Colorado*, *supra*, and held that state courts must exclude evidence obtained in an unreasonable search and seizure. If it were clear that *Mapp* barred all use by the state of the illegally obtained evidence here involved, the injunction below could properly be dissolved, not so much because of federal-state relations as of the traditional principle that equity will not act where there is an adequate remedy elsewhere. The scope of *Mapp* is, however, unclear in several regards, such as its application to federal statutory or rule, as well as constitutional, prohibitions or to state administrative proceedings such as those of the Waterfront Commission. Moreover, it is our understanding that a rehearing of *Mapp* is being sought, thus leaving the question still open for some months. Hence we find no present justification for dissolving the injunction. Should the various problems left unsolved by *Mapp* be clarified, so that it becomes clear that the injunction is in fact unnecessary, the district court, on application of any party in interest, may order its dissolution.

Order affirmed.

ANDERSON, *District Judge* (dissenting):

While I agree with the majority that Judge Bryan's order should be affirmed, I am of the opinion that, as a result of the intervening decision of the Supreme Court in *Mapp* v. *Ohio*, June 19, 1961, the injunction should now be

dissolved. I must, therefore, dissent from that portion of the majority's decision which continues the injunction in effect.

The reason given in the majority opinion for not dissolving the injunction is that equity must act because there is no adequate remedy elsewhere, i.e., in this case, in the state court of New York; and the reason there is no remedy in the state court is that, while *Mapp* v. *Ohio*, now requires state courts to exclude evidence obtained in violation of the unreasonable search and seizure provision of the Fourth Amendment, the *Mapp* case is, nevertheless, "unclear in several regards, such as its application to federal statutory or rule, as well as constitutional, prohibitions or to state administrative proceedings such as those of the Waterfront Commission." The use of the phrase "as well as constitutional" implies that *Mapp* is clear enough where the evidence sought to be used in a state court was obtained as the result of an unreasonable search and seizure. In any event, the opinion of the Court in the *Mapp* case said, "we hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." This appears to be reasonably explicit. That this is also binding upon the Waterfront Commission is implicit in the Court's discussion in the *Mapp* case of the protection afforded by the Fourth Amendment to the citizens' rights to privacy. It is also supported by civil cases to which the Fourth Amendment has been held to apply. *Rogers* v. *United States*, 97 F.2d 691 (1st Cir. 1938); *Ex parte Jackson*, 263 Fed. 110 (D. Mont. 1920); *Schenck ex rel. Chow Fook Hong* v. *Ward*, 24 F. Supp. 776, 778 (D. Mass. 1938); *Tovar* v. *Jarecki*, 83 F. Supp. 47 (N. D. Ill. 1948). See also *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 at 392.

There is no question that in the present case Bolger's confession was procured through violations of Rule 5(a)

F. R. Crim. P. *and* of the Fourth Amendment. Judge Bryan said, "It needs no further discussion to demonstrate that the incriminating statement was the result of a clear violation of Rule 5(a) of the Federal Rules of Criminal Procedure *and of the illegal search and seizure* and I so find." 189 F. Supp. at 254 (emphasis added):

As the procurement of Bolger's confession was in violation of the Fourth Amendment, the decision in *Mapp* v. *Ohio*, requires the state court of New York to hold it inadmissible in evidence; Bolger, therefore, has his remedy in the state court, and the injunction issued by the court below is now unnecessary and should be dissolved.

There may be some concern lest the New York court find that the Fourth Amendment does not render the confession inadmissible here, because Cleary, the state officer, did not actually participate in the illegal search and seizure and only participated in getting the confession, by his presence, though other state agents had questioned Bolger. But it would take some lively sophistry on the evidence adduced here to find that the confession was not a fruit of the illegal search and seizure. That "fruits" are proscribed by the *Mapp* case is apparent from the discussion on page 16 (slip sheet opinion), and by the references on p. 6 to *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920); see also *Nardone* v. *United States*, 308 U. S. 338 (1939); *Somer* v. *United States*, 138 F.2d 790 (2d Cir. 1943).

The reasoning of the majority seems to be that because there is a risk that the state court may not apply *Mapp* to the facts of this case, and because *Mapp* is "unclear" as to whether or not it compels the states to follow federal statutes and rules enacted to implement and preserve constitutional rights, the doctrine of *Rea* v. *United States*, 350 U. S. 214 (1955) should be extended to cover a *state official* testifying in a *state court prosecution*, to preserve the integrity of federal rules and statutes.

Appendix A

The *Rea* case stands for the proposition that the district courts have a duty to enjoin *federal law enforcement agents* from testifying in a state court prosecution concerning evidence illegally gained. This ruling was made in a case where it was perfectly clear that the federal agent, balked by the federal rules from using the illegally gained evidence in the district court, where the evidence was suppressed, with the specific intent of using it in the state court, himself "swore to a complaint before a New Mexico judge and caused a warrant for petitioner's arrest to issue." To bring the present case within the "fall-out" area of *Rea* the majority say "the federal officials attempted to pass the fruits of their illegal activities on to the state by calling in state officials at the time of the illegal detention." This finding of intent and purpose was never made by the trial court. The most said by the trial court in its finding was, "The Waterfront Commission, which worked in close cooperation with the Customs Service, had been informed of Bolger's detention." Later in its discussion the trial court said, "He (Cleary) was present at the questioning as a representative of the Waterfront Commission * * * This was the result of the commendable cooperation between the Customs Service and the Commission who were both concerned with law enforcement on the waterfront," and later, "Cleary was present at the questioning by invitation of the Customs Service." Nowhere is there anything to indicate that this invitation and cooperation was part of an evil purpose of the federal agents to "attempt to pass the fruits of their illegal activities on to the state" to promote a prosecution there, which could not be carried out in the federal court. There is nothing to show that Cleary's presence came about as the result of anything more than what the Supreme Court referred to in *Elkins v. United States*, 364 U. S. 206 at 211 as "* * * the entirely commendable practice of state and federal agents to co-

operate with each other in the investigation and detection of criminal activity." Cleary was not present at the confession merely as a casual by-stander or as a witness or as a "human recorder"; he was a law enforcement officer of the State of New York, present in the course of his official duties.

There was good reason at the time of the issuance of the injunction by the trial court, before the Supreme Court's holding in *Mapp* v. *Ohio*, *supra*, to include within its reach, Cleary, the state official, to prevent a violation of Bolger's constitutional rights, for Bolger then had no other recourse. To continue it now is, in effect, saying that, though the state court is now bound to protect Bolger's rights under the Fourth Amendment, *Mapp* does not make it clear that the state courts are bound to protect Bolger against a violation of Rule 5(a) F. R. Crim. P., and the federal courts must, therefore, enjoin a state agent from testifying in a state court to insure the integrity of the application of that federal rule. This, to my mind, is an unwarranted invasion of the rights and powers of the states.

To attempt to base a rule on the degree or weight of the state agent's participation in a joint enforcement endeavor is wholly impractical. Either the law should be that the use in the state courts of all evidence obtained by state agents, illegally under federal rules or statutes, shall be enjoined by the district courts where, in procuring that evidence, the state agents have been assisted, in whole or in part by federal agents; or the law should be that the admissibility of such evidence in the state courts shall be left wholly in the power of the state courts. The majority decision which leans toward the former principle means that in every case where there has been any degree of "commendable cooperation" between federal and state enforcement officers, and there are involved federal constitutional rights which the states must recognize, the states are also

bound to recognize and apply federal statutes or rules of procedure, made to implement and preserve them, or have their state proceedings disrupted by a federal court's injunction, if they fail to do so. To require the states to follow and apply congressional enactments and the rules of the federal courts in this fashion would constitute a long step toward the destruction of the division of powers. It is directly contrary to *Pugach* v. *Dollinger*, 365 U. S. 458 (1961).

Moreover, the practical consequence would be that in nearly all cases where there had been any contact at all between federal and state enforcement officers, leading to a state prosecution, a question would be raised in the district courts by means of a petition for an injunction to determine whether or not such federal statutes or rules had been complied with. Meanwhile, the district court would be compelled to stay the state court proceedings until it had had an opportunity to hear and decide the matter. It takes no major prophet to envisage the "insupportable disruption" which would result. *Stefanelli* v. *Minard*, 342 U. S. 117, 123-125 (1951).

I must disagree with this extension of the holding in the *Rea* case. The plaintiff's rights under the Fourth Amendment must now, in the light of *Mapp* v. *Ohio*, *supra*, be protected by the courts of the State of New York. He has his remedy there, and the injunction issued by the federal court should now be dissolved.

Appendix A.

Order of the District Court.

The plaintiff herein having served and filed his complaint demanding a permanent injunction against the above named defendants, as appears more fully by said complaint and the prayer for relief therein contained and said action and issues therein having been joined by the answer of the defendants herein, and the trial having come on before me and having been had, and after hearing the evidence adduced by the plaintiff and the defendants herein and upon due consideration thereof, it is

ORDERED, ADJUDGED AND DECREED that the defendants William J. O'Shea, Thomas F. Loughman, Walter J. Conlon and Joseph E. Patterson are hereby enjoined from testifying in the State criminal proceedings with respect to any evidence obtained during the illegal search and seizure conducted at the house of Edward Bolger, plaintiff, in Keansburg, New Jersey on September 12, 1959 and from turning over to State Law Enforcement Authorities and producing in any State criminal proceeding any property seized at the house of Edward Bolger, plaintiff, on that day, including the Stenorette tape-recording machine, and it is further

ORDERED, ADJUDGED AND DECREED that the defendants William J. O'Shea, Thomas F. Loughman, Walter J. Conlon, Joseph E. Patterson and Dorothy T. Zecha are hereby enjoined from testifying as to any statements made by the plaintiff, Edward Bolger, after his departure from Enforcement Headquarters of the United States Customs at 54 Stone Street, City, County, State of New York and the Southern District of New York at about 11 o'clock A. M. on September 12, 1959, including the statement in question and answer form taken from the plaintiff beginning at about 6 o'clock P. M. on that day, and from turning over the transcript of any statement or statements taken from the

plaintiff herein, Edward Bolger, during such period to State law enforcement authorities, or from producing such transcript in any State criminal proceedings, and it is further

ORDERED, ADJUDGED AND DECREED that the defendants William J. O'Shea, Thomas F. Loughman, Walter J. Conlon, Joseph Patterson, Dorothy T. Zecha and Michael Cleary are hereby enoined with respect to transactions and statements subsequent to 11:00 A. M. on September 12, 1959 from giving any testimony or producing any statements in question and answer form, or other statements or producing any evidence before the Waterfront Commission of New York Harbor at any hearing or trial conducted by the said Waterfront Commission of New York Harbor against the said plaintiff, Edward Bolger, with respect to any statements, in question and answer form made on September 12, 1959 and producing any property illegally seized during the unlawful search of plaintiff's house at Keansburg, New Jersey on September 12, 1959, and it is further

ORDERED, ADJUDGED AND DECREED that the defendant Michael Cleary is hereby enjoined from giving any testimony or producing any evidence or statements either oral or in question and answer form obtained by him from defendants William J. O'Shea, Thomas F. Loughman, Walter J. Conlon, Joseph E. Patterson and Dorothy T. Zecha on September 12, 1959 in any State criminal proceedings against the plaintiff herein, Edward Bolger, with respect to any statements, including the statement in question and answer form while the plaintiff was illegally detained at 201 Varick Street, City, County, State of New York and the Southern District of New York on September 12, 1959, and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff Bolger's application for an order directing the return to him of the properties seized by defendants William J. O'Shea, Walter J. Conlon and Joseph E. Patterson at plaintiff's home at Keansburg, New Jersey on September 12, 1959 be and hereby is denied and that the said merchandise be retained in the possession, custody and control of the Collector of Customs of the Port of New York for disposition in accordance with the Customs Laws and Regulations, but without prejudice to such further proceedings by the plaintiff with respect to such properties as may be authorized by law, and it is further

ORDERED AND ADJUDGED that the defendants William J. O'Shea, Thomas F. Loughman, Walter J. Conlon, Joseph E. Patterson, Dorothy T. Zecha and Michael Cleary pay the costs of these proceedings, exclusive of plaintiff's attorney's fees, as taxed by the Clerk.

Dated: New York, N. Y., December 20, 1960.

FREDERICK V. P. BRYAN,
U. S. D. J.

Rec'd in Clerk's Office: 12/21/60.
Judgment Entered: 12/21/60.

HERBERT A. CHARLSON,
Clerk.

Appendix A

Judgment of Affirmance of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of August one thousand nine hundred and sixty-one.

Present: HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
Circuit Judges,
HON. ROBERT P. ANDERSON,
District Judge.

EDWARD BOLGER,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants,

MICHAEL CLEARY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

Appendix A

Decision of the Court of Appeals dated September 25, 1961 Denying Rehearing

Before CLARK and WATERMAN, Circuit Judges, and ANDERSON, District Judge.

On Petition for Rehearing.

William P. Sirignano, Gen. Counsel, and Irving Malchman, Asst. to the Gen. Counsel, Waterfront Commission of New York Harbor, New York City, for petitioner-appellant Michael Cleary.

PER CURIAM.

Petition for rehearing denied.

C. E. C.,
S. R. W.,
U. S. C. J.J.

I dissent and vote to grant.

R. P. A.,
U. S. D. J.

September 25, 1961

Appendix A

Decision of the Court of Appeals dated September 26, 1961 Denying Rehearing *In Banc* for Lack of a Majority in Favor Thereof

Before LUMBARD, Chief Judge, CLARK, WATERMAN, MOORE, FRIENDLY and SMITH, Circuit Judges.

On Petition for Rehearing In Banc.

William P. Sirignano, General Counsel, and Irving Malchman, Assistant to the General Counsel, Waterfront Commission of New York Harbor, New York City, for petitioner-appellant Michael Cleary.

Judges Lumbard, Moore and Friendly having voted to grant the application, and Judges Clark, Waterman and Smith having voted to deny, the application is denied for lack of a majority in favor of the application.

J. EDWARD LUMBARD,
Chief Judge.

26 September 1961

Appendix A

Decision of the Court of Appeals dated October 20, 1961 Denying Leave to Refile Petition for Rehearing *In Banc*

MOTION FOR LEAVE TO REFILE PETITION FOR REHEARING IN BANC

William P. Sirignano, New York, N. Y., for appellant.

All the active judges concurring, the motion is denied.

J. EDWARD LUMBARD,
Chief Judge.

October 20, 1961

Supreme Court of the United States

OCTOBER TERM, 1962

No. 57

MICHAEL CLEARY,

Petitioner,

v.

EDWARD BOLGER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

WILLIAM P. SIRIGNANO,
General Counsel, Waterfront Commission
of New York Harbor, and Attorney
for Petitioner,
15 Park Row,
New York 38, N. Y.

Of Counsel:
IRVING MALCHMAN,
Assistant to the General Counsel.

Dated: August, 1962.

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Cases Cited

Cases:

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Supreme Court of the United States

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No. 57

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v.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the District Court (R. 7-34) is reported at 189 F. Supp. 237. The opinion of the Court of Appeals (R. 38-47) is reported at 293 F. 2d 368.

Jurisdiction

The judgment of the Court of Appeals was entered on August 4, 1961 (R. 48).

Petition for rehearing *in banc* was denied on September 25, 1961, by the same panel of the Court of Appeals as

originally sat on the instant case (R. 49-50). Then, the Court of Appeals, sitting *in banc*, divided three-to-three on the petition for rehearing and accordingly denied rehearing on September 26, 1961, for lack of a majority in favor thereof (R. 51-52). An application by petitioner for leave to refile his petition for rehearing *in banc* was denied by all the active judges of the Court of Appeals on October 20, 1961 (R. 53).

The petition for certiorari was filed on December 23, 1961, and was granted February 19, 1962. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Statutes Involved

Section 2283 of Title 28 provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Rule 5(a) of the Federal Rules of Criminal Procedure provides:

> "Rule 5. Proceedings before the Commissioner
>
> (a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without necessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

Rule 41(a) of the Federal Rules of Criminal Procedure provides:

"Rule 41. Search and Seizure

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record or by a United States commissioner within the district wherein the property sought is located."

Questions Presented

1. Whether it was an improvident exercise of federal equitable power to enjoin petitioner, a state officer, from testifying against respondent in a state criminal and in also a state administrative proceeding against respondent (both of which state proceedings had been instituted and were pending at the time the instant suit was commenced) where petitioner was present (but did not participate) in an interrogation of respondent by federal customs officers while respondent was illegally detained by the federal customs officers, which detention followed an illegal search and seizure of respondent's home by the federal customs officers (at which search and seizure petitioner was not even present).

2. Whether such injunction is prohibited by the provisions of Section 2283 of Title 28 of the United States Code.

Statement

The order of the District Court herein (R. 35-37) enjoins petitioner Cleary, a state officer (*i.e.*, an investigator for the Waterfront Commission of New York Harbor) from testifying or producing any evidence against re-

spondent Bolger (1) in a criminal proceeding pending against Bolger in the Court of Special Sessions of the City of New York for petit larceny and (2) in a hearing pending against Bolger before the Waterfront Commission to determine whether to revoke or suspend Bolger's license as a hiring agent and Bolger's registration as a longshoreman. As appears more fully hereinbelow, petitioner has no evidence to produce against Bolger since the District Court enjoined the customs officers from turning any over and therefore only that part of the injunction prohibiting petitioner from testifying is at issue here. Both the state criminal prosecution and the Commission's hearing had been instituted and were pending at the time the instant suit for an injunction was commenced in the District Court (R. 4; complaint, pars. 15-17).

The facts, as set forth in the opinion of the District Court (Bryan, J.), rendered after trial, are as follows. Respondent Bolger is a hiring agent and longshoreman, licensed and registered, respectively, as such by the Waterfront Commission and he is employed on the New York waterfront (R. 8). On Saturday morning, September 12, 1959, between about 8:00 and 8:30 A.M., certain federal customs officers who were on the lookout for thefts from the piers, particularly thefts of liquor, observed Bolger take a cardboard carton from a deserted pier and place the carton in his car (R. 9-10). Upon a search of both Bolger's person and his car, the customs officers found in Bolger's car two windshield wipers and six spark plugs stamped "Made in England" (R. 10). In addition, Bolger, when questioned, said that he had six or eight bottles of liquor at home which he had bought from crew members who, in turn, he said, had bought the liquor from ship's stores (R. 10). At about 9:00 A.M. the customs officers decided to take Bolger into custody (R. 10). The District Court found that the initial search and arrest of Bolger by the customs officers were legal under the authority conferred by the Tariff Act of 1930 (R. 23-25).

Respondent Bolger was taken to an office of Customs in New York City and, after some preliminary questions, he admitted that he had some thirty or forty bottles of liquor obtained from seamen, and additional merchandise, at his home in Keansburg, New Jersey (R. 11). Later in the interrogation, Bolger signed a written consent to a search of his home (R. 11), which the District Court found to be void and of no effect because, after first refusing to sign the consent without consulting a lawyer, Bolger was induced to sign the consent by misrepresentations that his consent was actually not needed for a search of his home (R. 11, 27-28).

Shortly before 11:00 A. M., the customs officers, together with respondent Bolger, left New York in a government car for Bolger's house in Keansburg, New Jersey, where they arrived about noon (R. 12). A search was made of Bolger's house for about two hours, during which certain apparently contraband merchandise was found, including a Stenorette tape recording machine made in West Germany (R. 12). The District Court found that, from about 11:00 A. M. to 1:00 P. M., a United States Commissioner was in attendance that day at the United States Court House a few blocks away from the office of Customs (R. 26).

The federal customs officers, together with respondent Bolger, left Keansburg, New Jersey, at about 2:00 P. M., and they arrived at one of the offices of Customs in New York City at about 4:00 P. M. (R. 12). The customs officers took back with them the apparently contraband merchandise, including the Stenorette tape recorder, which they found in Bolger's home (R 12-13).

It will be noted that petitioner was not present during, and thus did not participate, in any of the foregoing events. The Waterfront Commission, which worked in close cooperation with Customs, had been informed of Bolger's detention by Customs (R. 12, 13). Petitioner was present at the Customs office upon Bolger's return

from his home and ascertained that Bolger had a key to the basement of an apartment house in New York City which Bolger said was a tool room where he occasionally repaired pier equipment (R. 13). Petitioner and a customs officer drove Bolger to the basement tool room which was searched without finding anything. Petitioner and the customs officer then returned with Bolger to the office of Customs at about 5:45 P. M. (R. 13). (Since no incriminating evidence was found in the search of the basement tool room, it is not a factor in the case.)

Respondent Bolger was then asked if he was willing to make a statement concerning the merchandise seized from his home (R. 13). Bolger was told that he did not have to make such a statement and that anything said could be used against him (R. 13). Bolger apparently did not object and he was sworn and questioned before a customs shorthand reporter (R. 13). Petitioner, who was present, merely observed and did not participate in the questioning (R. 13). During the course of this questioning, Bolger made some incriminating statements, both as to the merchandise seized generally in his home and the Stenorette tape recorder (R. 13, 29). The questioning concluded at about 7:00 P. M. and Bolger was permitted to leave at about 7:20 P. M. (R. 13).

No federal charges were ever lodged against respondent Bolger (R. 14). However, about a month later, Bolger was charged by the New York authorities with grand larceny for theft of the Stenorette tape recorder, one of the articles seized at Bolger's house by the customs officers (R. 14). As a result of the New York State larceny charge, the Waterfront Commission instituted proceedings to revoke or suspend Bolger's longshoreman's registration and hiring agent's license and temporarily suspended Bolger's registration and license (R. 14). Under the Waterfront Commission Act, a hiring agent's license may be revoked or suspended for lack of good character

and integrity (New York McKinney's Unconsolidated Laws 9818, 9814; New Jersey Statutes Annotated 32:23-18, 32:23-14) and a longshoreman's registration (as well as a hiring agent's license) may be revoked or suspended for an act of misappropriation on the waterfront (New York McKinney's Unconsolidated Laws 9913; New Jersey Statutes Annotated 32:23-93). (While it does not appear in the record, the Commission's charges that Bolger lacks good character and integrity include, in addition to the charge of misappropriation of the Stenorette tape recorder, the charge that Bolger possessed other merchandise at his home knowing it to be stolen.)

The instant action was commenced by respondent Bolger after both the New York criminal prosecution and the Waterfront Commission's revocation proceeding had been instituted against him (R. 8-9). Bolger had originally named as defendants herein the United States of America and the Secretary of the Treasury but the action as to these defendants was dismissed prior to the trial below in the District Court (R. 8). Bolger also instituted a second injunction action against the members of the Waterfront Commission, themselves (R. 9). This second action was dismissed by the District Court after a consolidated trial below (R. 33-34).

The District Court determined that respondent Bolger's house had been illegally searched and that property had been illegally taken therefrom by the federal customs officers; that Bolger's detention by the customs officers after 11:00 A. M. without arraignment before a United States Commissioner (who was in attendance nearby from 11:00 A. M. to 1:00 P. M.) was also illegal; that after such illegal search and seizure and while illegally detained, Bolger gave a highly incriminating statement before a customs reporter; that the detention and search and seizure were illegal by virtue of being violative of Rules 5(a) (prompt arraignment) and 41(a) (issuance of warrant for

search and seizure), respectively, of the Federal Rules of Criminal Procedure; and that Bolger's statement resulted from both the illegal search and seizure and the illegal detention (R. 25-30).

The District Court issued an injunction prohibiting the federal customs officers and also the customs shorthand reporter in effect from testifying or producing any evidence in any state proceeding against respondent Bolger (R. 29-30, 35-37). The District Court stated this injunction was being granted in the exercise of its supervisory powers over federal law enforcement agents (R. 30). However, the District Court denied the application by Bolger for a return of the property seized from his home upon the ground that this property was contraband, thus freezing the property in the custody of Customs in view of the injunction against the customs officials prohibiting them from producing the property in any state proceeding against Bolger (R. 33).

With respect to petitioner, the District Court made the following finding (R. 32):

> "In the case at bar the wrongful activities were all those of federal officers and were conducted or directed by them. All that was done during the period of unlawful detention, and particularly the taking of the incriminating statement from Bolger, was being done on behalf of the United States. Cleary [petitioner] was merely a witness to them . . ."

However, the District Court also enjoined petitioner in effect from testifying or producing any evidence in any state proceeding against respondent Bolger (R. 35-37). The ground stated by the District Court for the issuance of the injunction against petitioner was that it was necessary in order to effectuate, and as an incident to, the injunction against the federal customs officers because petitioner "participated as a witness in the unlawful acts of

the federal officers acting on behalf of the United States" (R. 33). The District Court stated (R. 32):

> "If no injunction can be issued against Cleary [petitioner] he is in a position to testify in the state court proceedings as to Bolger's admissions before the federal agents and thus to act as a vehicle to defeat the policy enunciated in the *Rea* case of protecting the privacy of the citizen against invasion in violation of the federal rules. Thus, the federal agents would be able to flout the rules and to use the fruits of their unlawful conduct in the state proceedings through the medium of Cleary."

By judgment and decision dated August 4, 1961, the Court of Appeals affirmed the District Court by a two-to-one vote (R. 38-48). This decision was rendered by a panel comprised of Circuit Judges Clark and Waterman and also District Judge Anderson (who dissented).

Petitioner filed a petition for rehearing *in banc* dated August 18, 1961 (R. 48). On September 25, 1961, this petition for rehearing was denied by the original panel of the Court of Appeals, Circuit Judges Clark and Waterman voting to deny the petition and District Judge Anderson voting to grant the petition (R. 49-50). Then, on September 26, 1961, the Court of Appeals rendered the following decision with respect to petitioner's petition for rehearing *in banc* (R. 51):

> "Judges Lumbard, Moore and Friendly having voted to grant the application, and Judges Clark, Waterman and Smith having voted to deny, the application is denied for lack of a majority in favor of the application."

Subsequently, by application dated October 10, 1961, petitioner applied for leave to refile his petition for rehearing *in banc* so as to give the newly appointed Judges of the

Court of Appeals an opportunity to vote upon the matter (Circuit Judges Hays, Kaufman and Marshall). This application was denied by order of the Court of Appeals dated October 20, 1961, "[a]ll the active judges concurring" (R. 53-54).

Summary of Argument

I

A. 1. The injunction against petitioner is in conflict with the applicable decisions of this Court. This Court has held that the federal courts should not enjoin state officers from producing illegal state search and seizure evidence or state wiretap evidence, or enjoin federal officers from testifying with respect to, or producing, illegal federal search and seizure evidence, in state criminal prosecutions. *Stefanelli* v. *Minard*, 342 U. S. 117; *Pugach* v. *Dollinger*, 365 U. S. 458; *Wilson* v. *Schnettler*, 365 U. S. 381. Together, these decisions unmistakably spell out a policy against piecemeal interference by the federal courts in state criminal prosecutions. The decision in *Rea* v. *United States*, 350 U. S. 214, that a federal agent was subject to an injunction prohibiting him from producing or testifying about illegal federal search and seizure evidence in a state prosecution is entirely congruent with such policy since *Rea* rests upon a singular state of facts involving the integrity of a federal court order, *i.e.*, a federal suppression order in a prior federal criminal prosecution against the same criminal defendant. Further, in *Rea*, the injunction was against a federal officer and not, as here, against a state officer.

2. The "insupportable disruption" of state law enforcement proceedings which was referred to in *Stefanelli* has become a harsh reality in this case. Both the New York criminal prosecution and the Waterfront Commission's revocation proceedings have been required to mark time

for three years pending the outcome of this litigation. Plainly, if this type of interruption is multiplied upon any scale at all, the result, will be, in somber fact, a stultification of state law enforcement proceedings.

3. The vindication of federal rights does not require piecemeal interference by the federal courts in state criminal proceedings. In effect, the instant case is simply an application to the equity side of this Court to nullify or circumvent prior decisions rendered on the law side of this Court. The decisions by this Court at law were not the result of an unyielding formalism—such as led to the historic conflict between King's Court and Chancery—but rather were made upon the merits and accordingly should be followed by this Court in equity as well. If those decisions are to be changed, this should be done directly and forthrightly at law upon a reconsideration of the merits, and not by resort, as here, to a flanking attack which not only obscures the considerations involved in the merits but which creates a needless conflict between the federal and state courts.

4. Moreover, it is problematical whether or not the result at law would actually be adverse to respondent Bolger. This is particularly true in light of this Court's decision in *Mapp* v. *Ohio*, 367 U. S. 643. While the instant case involves, upon the merits, many novel legal questions that are open in this Court, such questions should be decided, at least in the first instance, in the usual manner at law in the state courts subject to the review available in this Court. Unless the basis for federal piecemeal interference with state law enforcement proceedings is to be immeasurably expanded, the mere uncertainty of the result at law (in contradistinction to an established adverse result as in *Pugach*) is not an adequate ground for federal equitable jurisdiction. Moreover, the real basis for the claimed inadequacy of the remedy at law (a claim never recognized by this Court) was that no federal rights were vindicable

at all in this entire area (a fact no longer true by virtue of *Mapp*), and not that there might be peripheral differences in the admissibility of evidence between the federal and state courts.

5. The statement by the court below that petitioner was being enjoined not in his capacity as a state officer but as a witness to illegal activities by federal agents is irreconcilable with the record facts which show that petitioner acquired the information in question in the performance of his official duties as a Waterfront Commission investigator. Further, this characterization simply begs the questions at issue in this case.

B. 1. The policy against federal piecemeal interference with state law enforcement proceedings is equally applicable to a hearing of a state law enforcement agency such as the Waterfront Commission. The state criminal prosecution and the Commission's revocation proceedings are simply different aspects of related state action.

2. Upon established principles of administrative law, respondent Bolger is first required to exhaust his administrative remedies before instituting court proceedings. In addition, the judicial review provisions of the Waterfront Commission Compact, which was approved by Congress, specifically provides for review of only the "final decision or action" of the Commission and then only in the state courts.

II

1. The injunction against petitioner's testimony in New York's criminal prosecution is prohibited by Section 2283 of the Judicial Code. Petitioner's testimony is indispensable to New York's criminal prosecution against respondent Bolger, and, if the injunction stands, New York will be required to dismiss its criminal case against Bolger. The prohibition of Section 2283 against staying proceedings in state courts embodies a long-standing and comprehensive

rule of comity. It thus prohibits a restraint of the parties as well as all steps taken or which may be taken in the state court from the institution to the close of final process. Since the effect of the injunction is to require New York to dismiss its criminal case against Bolger, it follows that the injunction is inconsistent with the comprehensive policy of comity embodied in Section 2283. Further, the injunction against petitioner is equivalent to an injunction against the State of New York, as a party, for the State is not a natural person and can only act as a party through its officers, attorneys and agents, including particularly petitioner whose testimony is indispensable to the prosecution.

2. The decision by this Court in the *Rea* case does not constitute authority for holding that the injunction here is not prohibited by Section 2283. The injunction in *Rea* was clearly ancillary to the prior federal suppression order and, therefore, came within the expressed exception of Section 2283 prohibiting a stay of state court proceedings by the federal court "except . . . where necessary . . . to protect or effectuate its judgments", the term "judgment" encompassing interlocutory as well as final orders. Further, the injunction in *Rea* was against a federal, and not, as here, a state officer.

3. Nor does the fact that the Civil Rights Act (*i.e.*, 28 U.S.C. 1343(4)) is the apparent basis for federal jurisdiction herein bring this case within the exception of Section 2283 prohibiting a stay "except as expressly authorized by Act of Congress". The District Court thought that federal jurisdiction could be predicated upon 28 U.S.C. 1343(4) conferring jurisdiction over any action brought under any "Act of Congress providing for the protection of civil rights, including the right to vote". The District Court reached this result by reasoning that the Federal Rules of Criminal Procedure create substantive federal rights enforceable independently of any federal criminal proceeding. However, the enabling provisions of 18 U.S.C.

3771 as well as Rule 1 specifically make it plain that the Federal Rules only prescribe the procedure *in* federal criminal proceedings. Further, while the Federal Rules may have the force and effect of statutory law for their intended purposes, the Rules are not *strictissimi juri* an Act of Congress. Nor are the Federal Rules an "Act of Congress providing for the protection of civil rights, including the right to vote" within the intendment of 28 U.S.C. 1343(4) for, as the legislative history shows, Section 1343(4) was enacted as part of the Civil Rights Act of 1957 simply to conform the Judicial Code to such Civil Rights Act and no sweeping and radical enlargement of federal jurisdiction was intended. In any event, 28 U.S.C. 1343(4) does not come within the exception "except as expressly authorized by Act of Congress" since the only Acts of Congress which have been held to come within this exception have either vested the federal courts with exclusive jurisdiction over enforcement of a federal regulatory scheme or have explicitly contemplated the cessation of all other court proceedings with respect to the same subject matter. The Civil Rights Act (28 U.S.C. 1343(4)) is no such Act. Rather, it simply particularizes an area of the federal question jurisdiction for which no jurisdictional amount is required.

I

It was an improvident exercise of federal equitable power to enjoin petitioner, a state officer, from testifying in New York's criminal prosecution and in the Waterfront Commission's revocation proceedings.

A. It was improvident to enjoin petitioner from testifying in New York's criminal prosecution.

While the injunction herein prohibits petitioner from testifying or producing any evidence against respondent Bolger in both New York's criminal prosecution and the

Waterfront Commission's revocation proceedings against Bolger, petitioner, as has been noted, does not have any evidence that was seized from Bolger by the customs officers since the District Court enjoined the customs officers from turning any over. And since Bolger's application for a return of the seized property was denied by the District Court, such property or evidence is frozen in the custody of Customs. Accordingly, the only part of the injunction actually at issue here is that prohibiting petitioner from testifying as to what he saw and heard at Customs after Bolger's return to Customs from his home in New Jersey, including particularly Bolger's statement before a customs stenographer.

1. The injunction against petitioner—an injunction prohibiting a state officer from testifying in a state criminal prosecution which had been instituted and was pending at the time of the commencement of the instant action—is in conflict with the applicable decisions of this Court. In *Stefanelli* v. *Minard*, 342 U. S. 117, suit was brought under the Civil Rights Act to enjoin the use in a criminal trial in the State of New Jersey of evidence obtained by the New Jersey police in a search and seizure which, if made by federal officers, would concededly have violated the Fourth Amendment. This Court, however, declined to decide whether the complaint set forth a cause of action under the Civil Rights Act but instead held that an exercise of federal equitable jurisdiction in such circumstances would be improper. The Court enunciated a broad principle of non-interference with state criminal proceedings, stating (343 U. S., at pp. 120-121, 123-124):

> "We hold that the federal courts should refuse to to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure. The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-

American law. It is impressively reinforced when not merely the relations between coordinate courts but between coordinate political authorities are in issue. The special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law, has been an historic concern of congressional enactment, see, e.g., 28 U.S.C. §§ 1341, 1342, 2283, 2284(5), 28 U.S.C.A. §§ 1341, 1342, 2283, 2284(5). This concern has been reflected in decisions of this Court, not governed by explicit congressional requirement, bearing on a State's enforcement of its criminal law. E.g., Watson v. Buck, 313 U. S. 387, 61 S. Ct. 962, 85 L. Ed 1416; Beal v. Missouri Pacific R. Co., 312 U. S. 45, 61 S. Ct. 418, 85 L. Ed. 577; Spielman Motor Co. v. Dodge, 295 U. S. 89, 55 S. Ct. 678, 79 L. Ed. 1322; Fenner v. Boykin, 271 U. S. 240, 46 S. Ct. 492, 70 L. Ed. 927. It has received striking confirmation even where an important countervailing federal interest was involved.

* * * * * *

The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law —with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the

misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution."

Stefanelli was followed by the decision of this Court in *Rea* v. *United States*, 350 U. S. 214. In *Rea*, the Court, by a 5-4 vote, held that a federal narcotics agent was subject to an injunction prohibiting him from testifying with respect to, or producing, seized narcotics in a state narcotics prosecution. The narcotics had been seized by the federal agent pursuant to a search warrant improperly issued in violation of the Federal Rules of Criminal Procedure and had been ordered suppressed in a prior federal prosecution against the same person who was the defendant in the state prosecution. The Court specifically pointed out that under 28 U.S.C. 2463, which was applicable, the narcotics "shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and the decrees of the courts of the United States having jurisdiction thereof" (350 U. S., at p. 215). Further, the effect of the suppression order in *Rea* was that the suppressed property "shall not be admissible in evidence at any hearing or trial" and, therefore, the motion to enjoin in *Rea* was made "to prevent the thwarting of the federal suppression order". *Wilson* v. *Schnettler*, 365 U. S. 381, 387. Accordingly, the central issue in the *Rea* case was the integrity of a federal court order since in *Rea* the federal narcotics agent was attempting to circumvent and defeat the prior federal order which had suppressed the narcotics.

Then, upon the same day in the 1960 Term, the Court decided *Wilson* v. *Schnettler, supra*, and *Pugach* v. *Dollinger*, 365 U. S. 458. In *Wilson*, suit was brought by the defendant in a state narcotics prosecution, who had been

arrested without a warrant by federal agents and upon whose person the federal agents had found narcotics, to enjoin the testimony of the federal agents and the use of the narcotics as evidence in the state prosecution. No federal prosecution had ever been instituted against the state criminal defendant and accordingly no prior federal suppression order was involved. The Court held that the complaint had been properly dismissed upon the alternative grounds (1) that, though the complaint alleged that the arrest was made without a warrant, there was no allegation that the arrest was made without probable cause and (2) that there was no federal equitable jurisdiction to interfere with the state criminal proceeding for the reasons enumerated in *Stefanelli*. As already noted, the Court distinguished its decision in *Rea*, because there an injunction was issued against the federal agents "to prevent the thwarting of the federal suppresson order" in the prior federal prosecution (365 U. S., at p. 387). *Wilson* plainly and explicitly stated that it was not resting solely upon the defectiveness of the complaint but also upon the principle of non-interference with state criminal proceedings previously enunciated in *Stefanelli*, as follows (365 U. S., at pp. 385-86):

> "There is still another cardinal reason why it was proper for the District Court to dismiss the complaint. We live in the jurisdiction of two sovereignties. Each has its own system of courts to interpret and enforce its laws, although in common territory. These courts could not perform their respective functions without embarrassing conflicts unless rules were adopted to avoid them. Such rules have been adopted. One of them is that an accused 'should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial.' Ponzi v. Fessenden, 258 U. S. 254, 260, 42 S. Ct. 309, 310, 66 L. Ed. 607. Another is that federal

courts should not exercise their discretionary power 'to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent * * *.' Douglas v. City of Jeannette, supra, 319 U. S. at page 163, 63 S. Ct. at page 881.

By this action, petitioner not only seeks to interfere with and embarrass the state court in his criminal case, but he also seeks completely to thwart its judgment by relitigating in a trial *de novo* in a federal court the very issue that he has already litigated in the state court. 'If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. * * * To suggest these difficulties is to recognize their solution.' Stefanelli v. Minard, 342 U. S. 117, 123-124, 72 S. Ct. 118, 121-122, 96 L. Ed. 138."

Mr. Justice Stewart, who concurred in *Wilson*, stated that he could not base affirmance upon the ground that the complaint failed to allege that the arrest was made without probable cause but that he was limiting his concurrence to the ground that the case did not warrant equitable relief under the standards of *Stefanelli*.

And in the decision the same day by the Court in *Pugach*, a federal injunction against the use of state wiretap evidence in a state prosecution was denied. One of the decisions cited in the Court's short *per curiam* opinion in *Pugach* denying the injunction was *Stefanelli*.

Together, these decisions—*Stefanelli*, *Wilson*, and *Pugach*—decide the major variants in this area and hold

that the federal courts should not enjoin state officers from producing illegal state search and seizure or state wiretap evidence in a state criminal prosecution (*Stefanelli* and *Pugach*) and that the federal courts should also not enjoin federal officers from testifying with respect to, or producing, illegal federal search and seizure evidence in a state prosecution (*Wilson*). Together, these decisions unmistakably spell out a policy against piecemeal interference by the federal courts in state criminal prosecutions, a policy which not only is applicable here but which, by the decision in *Wilson*, subsumes the instant case since here the injunction is against a state, and not a federal, officer. The decision in *Rea* is entirely congruent with this policy against piecemeal interference in state criminal prosecutions since *Rea* rests upon a singular set of facts involving the integrity of a federal court order, *i. e.*, a prior federal suppression order. Further, in *Rea*, the injunction was against a federal, and not, as here, a state officer.

The unprecedented decision in this case, constituting the first time, to our knowledge, that a federal court has ever interfered with *state* conduct of a *state* criminal prosecution, is thus clearly in conflict with the applicable decisions of this Court.

2. The "insupportable disruption" of state law enforcement proceedings which was referred to in *Stefanelli* has become a harsh reality in this case. New York's criminal prosecution for larceny was instituted against respondent Bolger in October, 1959 (R. 4, 14). Shortly thereafter, the Commission instituted its proceeding to revoke Bolger's hiring agent's license and longshoreman's registration (R. 4, 14). Thus, the State's criminal prosecution and the Commission's revocation proceedings have been both required to mark time for three years pending the outcome of this litigation, which is essentially an interlocutory appeal to the federal courts by Bolger and which has involved the State's officers in a full plenary trial in the District Court

and in a subsequent round of appeals to this Court. Plainly, if this type of interruption is multiplied upon any scale at all, the result will be, in somber fact, a stultification of state law enforcement proceedings.

The disruptive effect which the injunction here would have upon state law enforcement proceedings was cogently pointed out by Judge Anderson in his dissent in the court below, wherein he stated (R. 47):

> "Moreover, the practical consequence would be that in nearly all cases where there had been any contact at all between federal and state enforcement officers, leading to a state prosecution, a question would be raised in the district courts by means of a petition for an injunction to determine whether or not such federal statutes or rules had been complied with. Meanwhile, the district court would be compelled to stay the state court proceedings until it had had an opportunity to hear and decide the matter. It takes no major prophet to envisage the 'insupportable disruption' which would result. *Stefanelli* v. *Minard*, 342 U. S. 117, 123-125 (1951)."

Further, an affirmance by this Court of the injunction here would have radiating consequences which it would not be possible to contain. An affirmance here would inevitably beget a large progeny of cases seeking to apply or to extend this case. It would become a common defense tactic to seek to delay and obstruct a state prosecution by applying to the federal courts for an injunction. Nor, we submit, is this hyperbole, for what we are saying here was stated by this Court, itself, in *Stefanelli*, wherein it stated that, if the injunction there requested were sanctioned, "Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal

forum, with review if need be to this Court, to determine the issue" (342 U. S., at p. 123) (*supra*, p. 16).

Furthermore, with respect to federal criminal proceedings, themselves, only last Term, this Court, in an unanimous decision, made it clear that motions to suppress the evidentiary use of material allegedly procured through an illegal search and seizure, whether such motions were made before trial or before indictment, were to be treated as interlocutory orders not subject to appeal because the "insistence [by Congress from the very beginning in the First Judiciary Act] on finality and prohibition of piecemeal review discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases" and because "the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law". *DiBella* v. *United States*, 369 U. S. 121, 124, 126. As applied to interlocutory appeals from state criminal prosecutions to the federal courts, the force of these considerations is compounded since they are reinforced by "considerations governing . . . perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States". *Stefanelli* v. *Minard*, *supra*, at p. 120.

3. It is not required here to make a choice between the policy against federal piecemeal interference with state criminal proceedings, on the one hand, and the vindication of federal rights, on the other. For the protection of federal rights does not require piecemeal interference by the federal courts in state criminal proceedings.

If federal rights have been violated, those rights may, and should be, asserted in the usual and time-honored manner at law in the state prosecution subject to the ulti-

mate review available in this Court. However, it is argued that federal equitable intervention in state criminal prosecutions is necessary because the particular evidence in question is admissible, insofar as federal law is concerned, in the state courts by virtue of prior decisions at law by this Court. Thus, under this argument, resort is had to the equity side of this Court in order, in effect, to nullify or circumvent prior decisions rendered on the law side of this Court.

When, during the formative period of English law, the Lord Chancellor rendered decisions that were contrary to those of the Kings Court, he was at least acting out of reasons of historical necessity—the existence of two competing and conflicting systems of law in the same state. Walsh, *Equity*, §§ 3-5 (1930 ed.). The reason for the development of equity's exclusive jurisdiction—*i.e.*, a distinct and conflicting body of substantive law—lay in the historical fact that there did exist such two competing sets of courts. But for the same court—this Court—to develop a new body of federal substantive rights on its equity side that is in conflict with its decisions at law would be without justification either in history or reason. In effect, the Court would simply be warring upon itself and enjoining its own decisions.

There is no warrant for such an anachronistic solution. For the only barrier that exists at law is self-imposed. If the decisions of the King's Court sometimes shocked the conscience, the reason was that the King's Court had rendered itself powerless to do justice because of its own insistence upon an unyielding formalism. But surely this Court suffers from no such impotency on the law side. The decisions by this Court at law in this area were not the result of self-imposed metaphysical difficulties but rather were made upon the merits and accordingly should be followed by this Court in equity as well. If those decisions are to be changed, this should be done directly and

forthrightly at law upon a reconsideration of the merits, and not by resort, as here, to a flanking attack which not only obscures the consideration involved in the merits but which creates a needless conflict between the federal and state courts.

4. Moreover, it is problematical whether or not the result at law would actually be adverse to respondent Bolger. This is particularly true in light of this Court's recent decision in *Mapp* v. *Ohio*, 367 U. S. 643, holding that the state courts are constitutionally required by due process to exclude illegal search and seizure evidence. The decision in *Mapp* has already received full and unbegrudging implementation in the New York courts. E.g., *People* v. *O'Neil*, 11 N. Y. 2d 148, 227 N.Y.S. 2d 416 (1962); *People* v. *Loria*, 10 N. Y. 2d 368, 223 N.Y.S. 2d 462 (1961).

In fact, the explicit promise of *Mapp* is that the decision eliminates any further conflict between federal and state courts (367 U. S., at pp. 657-8).

> "Moreover, as was said in Elkins, '[t]he very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts.' 364 U. S. at page 221, 80 S. Ct. at page 1446. Such a conflict, *hereafter needless*, arose this very Term, in Wilson v. Schnettler, 1961, 365 U. S. 381, 81 S. Ct. 632, 5 L. Ed. 2d 620, in which, and in spite of the promise made by Rea, we gave full recognition to our practice in this regard by refusing to restrain a federal officer from testifying in a state court as to evidence unconstitutionally seized by him in the performance of his duties. Yet the double standard recognized until today hardly put such a thesis into practice. In non-exclusionary States, federal officers, being human, were by it invited to and did, as our cases indicate, step across the street to the State's attorney with their unconstitutionally seized evidence. Prosecution on the basis

> of that evidence was then had in a state court in utter disregard of the enforceable Fourth Amendment. If the fruits of an unconstitutional search had been inadmissible in both state and federal courts, this inducement to evasion would have been sooner eliminated. There would be no need to reconcile such cases as Rea and Schnettler, each pointing up the hazardous uncertainties of our heretofore ambivalent approach." (Emphasis supplied)

The position of the Court below, however, was that the applicability of *Mapp* was unclear in several respects and that, therefore, *Mapp* did not ensure respondent Bolger an adequate remedy at law (R. 42). Actually, this entire case bristles with novel legal questions. But, as we shall seek to show, the mere uncertainty of the result at law is not a sound argument for the injunction here but, rather, this is an argument which actually cuts the other way.

Accordingly, we shall discuss very briefly the admissibility of petitioner's testimony in this case under present decisions to show the nature of the questions that are involved. First, whether incriminating statements induced by an illegal federal search and seizure are inadmissible even in a federal criminal proceeding under the "fruit of the poisonous tree" doctrine is an open question in this Court which, however, may be decided by this Court this Term. *Wong Sun* v. *United States*, 288 F. 2d 366 (9th Cir. 1961), certiorari granted, 368 U. S. 817. Assuming the applicability of the "fruit of poisonous tree" doctrine to respondent Bolger's statements, there is the further question whether the combined effect of the decisions by this Court in *Mapp* and in *Elkins* v. *United States*, 364 U. S. 206 (tangible evidence obtained as the result of an illegal state search and seizure is inadmissible in a federal prosecution) would preclude oral testimony by petitioner, a state officer, in a state prosecution against Bolger, as to incriminating statements made by Bolger.

Secondly, with respect to the illegality of respondent Bolger's federal detention, this presents another open question—whether the testimony by petitioner, a state officer, would be inadmissible for this reason in a state prosecution against Bolger. Petitioner's testimony against Bolger would not be violative of due process. *Gallegos* v. *Nebraska*, 342 U. S. 55. The question however would appear to involve the applicability of the recent decision by the Court in *Coppola* v. *United States*, 365 U. S. 762, holding that a confession obtained by FBI agents through interrogation of a person who had been arrested and illegally detained by local police officers was not inadmissible in a *federal* prosecution against such person.

Finally another question concerns the assumption by the court below that the Federal Rules of Criminal Procedure create substantive federal rights that are enforceable as such independently of any federal criminal proceeding and that the injunction against petitioner was justifiable upon this ground. This conclusion by the court below is directly contrary to the decision by the Seventh Circuit in *Wilson* where it was explicitly held that Federal Rules do not create such substantive federal rights (275 F. 2d 932, 935). This conclusion, moreover, would appear to be doubtful in principle, at least as applied in this case. The Federal Rules were promulgated pursuant to the authority of 18 U.S.C. § 3771, which empowers this Court "to prescribe, from time to time, rules of pleading, practice and procedure with respect to any or all proceedings . . . in criminal cases". In accordance with this narrowly confined power to prescribe the practice *in* federal criminal proceedings, Federal Rule 1, relating to the scope of the Rules, specifically states that the "rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings". There certainly would appear, therefore, to be no warrant for the conclusion by the court below

that the Federal Rules constitute a substantive basis for enjoining the testimony of petitioner, a state officer, in a state—not a federal—criminal proceeding.

In any event, what is clear is that this case presents a thicket of legal questions that are open in this Court. These questions should be decided, at least in the first instance, in the usual manner at law in the state courts subject to the review available in this Court, as is the rule respecting every other federal right of a state criminal defendant. Never before has it been suggested that the federal courts may interfere with state criminal proceedings simply because it is uncertain what the result may be at law. In the other cases in this area, such as *Stefanelli* and *Pugach*, the result at law had already been established adversely to the plaintiff in equity by prior decisions of this Court. Here, in contradistinction, it cannot even be shown by respondent Bolger, who has the burden in this respect as the plaintiff in equity seeking to disrupt New York's criminal prosecution, that he has no remedy at law. If the mere uncertainty of the result at law is to be a ground for federal equitable jurisdiction, then surely the basis for federal piecemeal interference with state law enforcement proceedings will have been immeasurably expanded. Every peripheral question in this area, including all of the manifold variants of *Mapp*, may permissibly be litigated in the first instance via interlocutory appeals from state prosecutions in the form of suits for injunctions in the District Courts.

The court below suggested that, in the event the various problems left unsolved by *Mapp* were clarified so that it became clear that the injunction here was in fact unnecessary, application could then be made for a dissolution of the injunction (R. 43). This is not a satisfactory solution. For, unless decided in this case at law, it could be years before all of the open questions in this case are definitely resolved.

Moreover, even assuming the ultimate admissibility of petitioner's testimony at law and apart from our prior contention that any decision at law on the merits should either be followed in equity or forthrightly changed at law, the remedy at law would not for this reason be inadequate. For the real basis for the claimed inadequacy of the remedy at law (a claim never recognized by this Court) was that no federal rights were vindicable at all in this entire area (a fact no longer true by virtue of *Mapp*), and not that there might be peripheral differences in the admissibility of evidence between the federal and state courts. This, we believe, is the true basis for this Court's promise in *Mapp* that such decision eliminates any further conflict between the federal and state courts.

5. The court below stated that petitioner "is not being enjoined in his capacity as a state official, but as a witness invited to observe illegal activity by federal agents" (R. 41). Apart from everything else, this characterization respecting petitioner's capacity or status is irreconcilable with the record facts. Petitioner was present at Customs because Customs, which works in close cooperation with the Waterfront Commission, notified the Commission of respondent Bolger's detention (R. 1231). The District Court specifically found that petitioner "was present at the questioning as a representative of the Waterfront Commission, a bi-state agency of the States of New York and New Jersey as a result of information from the Customs Service to the Commission concerning the Bolger case" and that this "was the result of the commendable cooperation between the Customs Service and the Commission who were both concerned with law enforcement on the waterfront" (R. 31). Accordingly, the injunction prohibits petitioner, a state officer, from testifying in state law enforcement proceedings as to the information that he acquired in the course of the performance of his official duties.

Further, to say in these circumstances where the injunction nullifies the State's prosecution, that petitioner is being enjoined as a witness, and not as a state official, is to beg the questions at issue, namely, the propriety of the injunction in the light of the policy against federal piecemeal intervention in state law enforcement proceedings and also in the light of the rule of comity embodied in 28 U.S.C. 2283 (Point II, *infra*).

B. It was improvident to enjoin petitioner from testifying in the Waterfront Commission's revocation proceedings.

1. The policy enumerated by this Court in *Stefanelli* against federal piecemeal interference with state law enforcement proceedings is equally applicable to a hearing by a state law enforcement agency such as the Waterfront Commission. The Commission is charged with the task of eliminating racketeering and other evils on the New York waterfront. See, generally, *DeVeau* v. *Braisted*, 363 U. S. 144. Accordingly, no valid distinction can be drawn, insofar as the policy of *Stefanelli* is concerned, between the state criminal prosecution pending in the New York courts and the revocation proceedings pending before the Commission. In fact, both are simply different aspects of related state action.

2. Further, upon established principles of administrative law, the instant suit by respondent Bolger to enjoin petitioner's testimony before the Commission is premature since Bolger is required to first exhaust his administrative remedies. E.g. *Myers* v. *Bethlehem Ship Building Corp.*, 303 U. S. 41. Indeed, the judicial review provisions of the Waterfront Commission Compact, which has been approved by Congress, specifically contemplate that only the Commission's "final decision" shall be reviewable and then

only in the state courts in the first instance. Thus, Article XI of the Compact provides as follows:

"Article XI

Hearings, Determinations and Review

• • •

"6. *Upon the conclusion of the hearing,* the commission shall take such *action* upon such findings and determination as it deems proper and shall execute an order carrying such findings into effect. The *action* in the case of an application for a license or registration shall be the granting or denial thereof. The action in the case of a licensee shall be revocation of the license or suspension thereof for a fixed period or reprimand or a dismissal of the charges. The *action* in the case of a registered longshoreman shall be dismissal of the charges, reprimand or removal from the longshoremen's register for a fixed period or permanently.

"7. The *action* of the commission in denying any application for a license or in refusing to include any person in the longshoremen's register under this compact or in suspending or revoking such license or removing any person from the longshoremen's register or in reprimanding a licensee or registrant *shall be subject to judicial review* by a proceeding instituted in either state at the instance of the applicant, licensee or registrant *in the manner provided by the law of such state for review of the final decision or action of administrative agencies of such state,* provided, however, that notwithstanding any other provision of law the court shall have power to stay for not more than thirty days an order of the commission suspending or revoking a license or removing a longshoreman from the longshoremen's register." (67

Stat. 541, 554; McK. Unconsol. Laws 9850, 9851; N.J.S.A. 32:23-50, 32:23-51) (Emphasis supplied)

Hence, Section 6 provides that the "action" of the Commission "upon the conclusion of the hearing" shall be, in the case of a licensee, revocation or suspension of the license, or a reprimand, or dismissal of charges, and, in the case of a longshoreman, dismissal of charges, reprimand or removal from the longshoremen's register for a fixed period or permanently. Section 7 then provides that the Commission's "action" (using the same language as Section 6, prescribing the "action" to be taken after the hearing) in suspending, revoking or reprimanding a licensee or longshoreman shall be subject to judicial review in the manner provided by state law for "review of the final decision or action of administrative agencies".

The Compact thus specifically provides only for judicial review of the "final decision or action" of the Commission and then only in the state courts. Plainly, there has been no "final decision of action" of the Commission and therefore the instant interlocutory judicial review, particularly where sought in the federal courts, may not be had. *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375.

II

The injunction against petitioner's testimony in New York's criminal prosecution is prohibited by Section 2283 of the Judicial Code.

The injunction herein against petitioner's testimony in New York's criminal prosecution in effect stays, and has stayed, the prosecution. For petitioner's testimony is indispensable to the prosecution and we represent to this Court that, if this injunction stands, New York will be required to dismiss its criminal case against respondent Bolger.

1. Section 2283 of Title 28 (the Judicial Code) of the United States Code expresses a long-standing rule of comity. It is "a limitation of the power of the federal courts dating almost from the beginning of our history and expressing an important Congressional policy—to prevent needless friction between state and federal courts". *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4, 8-9.

Since Section 2283 embodies a rule of comity, the actual impact of the injunction upon the state court proceedings, rather than the form of the injunction, is perforce controlling under Section 2283. Hence, the interdiction of Section 2283 is not confined to an injunction against the state court *eo nomine*. "That the injunction was a restraint of the parties and was not formally directed against the state court itself is immaterial". *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co., supra*, at page 9. Further, the prohibition in Section 2283 is against a stay of "proceedings in a State court", a term which is entirely comprehensive. As this Court stated in *Hill* v. *Martin*, 296 U. S. 393, 403:

> "The prohibition of section 265 [section 2283] is against a stay of 'proceedings in any court of a State.' That term is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies to appellate as well as to original proceedings; and is independent of the doctrine of res judicata. It applies alike to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective. The prohibition is applicable whether such supplementary or ancillary proceeding is taken in the court which rendered the judgment or in some other. And it governs a privy to the state court proceeding—like

> Elinor Dorrance Hill—as well as the parties of record. Thus, the prohibition applies whatever the nature of the proceeding, unless the case presents facts which bring it within one of the recognized exceptions to section 265. It is not suggested that there is a basis here for any such exception."

It follows that the instant injunction against petitioner, a state officer whose testimony is indispensable to New York's prosecution, is inconsistent with the comprehensive policy of comity embodied in Section 2283 and constitutes therefore "an injunction to stay proceedings in a State court" that is prohibited by Section 2283. Otherwise, the way would be open to a wholesale circumvention of Section 2283 through the simple device of directing the injunction against critical witnesses or evidence. Further, the injunction against petitioner is equivalent to an injunction against the State of New York as a party, for the State is not a natural person and can only act as a party through its officers, attorneys and agents. As was asked rhetorically by the Court in *Harkrader* v. *Wadley*, 172 U. S. 148, 169, holding that it was impermissible under Section 2283 for a federal court to restrain the prosecuting attorney of a State from prosecuting an indictment:

> "How else can the state be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys, and its agents? And if all such officers, attorneys, and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the state itself is not subjected to the jurisdiction of the court as an actual and real defendant?"

The state officer—here petitioner—in possession of indispensable evidence is as much one of the "officers, attorneys and agents" of the State and is as vital to the State's

prosecution as is the prosecuting attorney. Plainly, in terms of comity, no valid distinction can be drawn between enjoining the indispensable testimony of petitioner and enjoining the prosecuting attorney, since the impact upon the prosecution is precisely the same.

2. The court below stated that the *Rea* case is "ample authority" for holding that the injunction here was not prohibited by Section 2283 (R. 42). However, the injunction in *Rea* came within one of the express exceptions to Section 2283 and accordingly *Rea* is inapposite here.

In *Rea*, as noted, there was a prior federal suppression order, the effect of which was that the suppressed evidence "shall not be admissible in evidence at any hearing or trial" and the motion to enjoin in *Rea* was made "to prevent the thwarting of the federal suppression order". *Wilson* v. *Schnettler, supra*, 365 U. S., at p. 387. Hence, the injunction in *Rea* was clearly ancillary to the prior suppression order and therefore came within the express exception of Section 2283 prohibiting a stay of state court proceedings by a federal court "except • • • where necessary • • • to protect or effectuate its judgments", the term "judgment" encompassing interlocutory as well as final orders. *Sperry Rand* v. *Rothlein*, 288 F. 2d 245 (2nd Cir. 1961).

Furthermore, the injunction in *Rea* was against a *federal* officer, rather than, as here, a *state* officer. This is another basic reason why *Rea* is not authority for the injunction here against petitioner, a *state* officer.

3. Nor does the fact that the Civil Rights Act (*i.e.*, 28 U.S.C. 1343(4)) is the apparent basis for federal jurisdiction herein bring this case within the exception of Section 2283 prohibiting an injunction to stay court proceedings "except as expressly authorized by Act of Congress". Though the complaint does not set forth any basis for federal jurisdiction, the District Court thought that federal

jurisdiction could be predicated, at least insofar as the custom officers were concerned, upon the provisions of 28 U.S.C. 1343(4) conferring the District Courts with jurisdiction over any action "under any Act of Congress providing for the protection of civil rights, including the right to vote (R. 21, footnote 1). The District Court reached this result by reasoning that the Federal Rules of Criminal Procedures create substantive federal rights, apparently enforceable independently of any federal criminal proceeding, and thus may be considered to be an "Act of Congress providing for the protection of civil rights, including the right to vote." But, as has been pointed out, the conclusion that the Federal Rules create substantive rights enforceable independently of any federal criminal proceeding is highly questionable, particularly with respect to testimony by petitioner, a *state* officer, in a *state* criminal prosecution.

Even assuming that the Federal Rights of Criminal Procedures do create such substantive rights, there is the further question whether the Federal Rules are an "Act of Congress providing for the protection of civil rights, including the right to vote". While the Federal Rules may have the force and effect of statutory law for their intended purposes (*i.e.*, to "govern the procedure . . . in all [federal] criminal proceedings"; Rule 1, F. R. Crim. P.), just as an administrative regulation may have the force and effect of statutory law for its intended purposes, certainly the Federal Rules are not, *strictissimi juri*, an Act of Congress. Nor would the Federal Rules appear to be an "Act of Congress providing for the protection of civil rights, including the right to vote" within the intendment of 28 U.S.C. 1343(4). For Section 1343(4) of Title 28 was enacted as part of the Civil Rights Act of 1957 (71 Stat. 634, 637) and the legislative history shows that Section 1343(4) was enacted as "merely technical amendments to the Judicial Code so as to conform it with amendments made to existing law by the preceding section of the bill",

that is, the *Congressionally enacted* Civil Rights Act of 1957. H. Rep. No. 291, 85th Cong., 1st Sess., p. 11. Thus, no sweeping and radical enlargement of the jurisdiction of the District Courts was intended by Congress in enacting Section 1343(4) of Title 28 and accordingly federal jurisdiction as against petitioner cannot be grounded upon Section 1343(4). (Petitioner contended from the beginning that there was no basis for federal jurisdiction as against him (R. 6). However, in light of this Court's intervening decision in *Mapp*, jurisdiction may presumably be predicated on the general grant of federal question jurisdiction in 28 U.S.C. 1331. Though respondent Bolger has neither alleged nor sought to prove that the jurisdictional amount of $10,000 is in controversy, he probably could do so since his right to work on the waterfront is involved in the Waterfront Commission's proceedings against him.)

In any event the Civil Rights Act (*i.e.*, 28 U.S.C. 1343(4)), as stated, does not come within the exception of Section 2283 prohibiting an injunction of state court proceedings "except as expressly authorized by Act of Congress". This question has engendered a conflict in decision among the lower federal courts. Some decisions have held that the Civil Rights Act is not within this exception to Section 2283. *Smith* v. *Village of Lansing*, 241 F. 2d 856 (7th Cir. 1957); *Island Steamship Lines, Inc.* v. *Glennon*, 178 F. Supp. 292 (D. Mass. 1959); *Aultman & Taylor* v. *Brumfield*, 102 Fed. 7, 12 (C.C.N.D. Ohio), appeal dism'd, 22 Supp. Ct. 938; *Cf. McQuire* v. *Amrein*, 101 F. Supp. 414, 420 (D. Md. 1951); *Mickey* v. *Kansas City, Mo.*, 43 F. Supp. 739, 742 (W.D. Mo. 1942). Other decisions have held to the contrary. *Cooper* v. *Hutchinson*, 184 F.2d 119, 124 (3rd Cir. 1950); *International Longshoremen's & Warehousemen's Union* v. *Ackerman*, 82 F. Supp. 65, 106-112 (D. Hawaii 1948), rev'd upon another ground, 187 F. 2d 860, cert. den. 342 U. S. 859. Cf.

Tribune Review Publishing Co. v. *Thomas*, 153 F. Supp. 486 (W. D. Penn. 1957), aff'd upon another ground, 254 F.2d 883. It is our contention that the former decisions are correct.

It is true that an Act of Congress "need not expressly refer to § 2283" to come within the statutory exception. *Amalgamated Clothing Workers* v. *Richman Brothers*, 348 U. S. 511, 516. But the only Acts of Congress which have been held to come within the exception in question either have pre-empted the subject matter and vested the federal courts with exclusive jurisdiction over enforcement of a federal regulatory scheme, *Amalgamated Clothing Workers* v. *Richman Brothers*, *supra*, or have explicitly contemplated the cessation of all other court proceedings with respect to the same subject matter, such as the Removal Act, the Interpleader Act, the Frazer-Lemke Farm-Mortgage Act, and the Act of 1851 limiting the liability of shipowners. *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118, 132-4. The Civil Rights Act is no such Act. Rather, it simply particularizes an area of the federal question jurisdiction for which no jurisdictional amount is required, similar, for example, to the jurisdiction based upon any Act of Congress regulating commerce (28 U.S.C. 1337). The Civil Rights Act accordingly is not an Act of Congress that vests exclusive jurisdiction in the federal courts. Cf. *Romero* v. *Weakley*, 226 F. 2d 399 (9th Cir. 1955); nor is it an Act that contemplates, explicitly or otherwise, the cessation of all other court proceedings with respect to the same subject matter.

There is therefore no warrant for viewing the Civil Rights Act as within the exception of Section 2283 prohibiting an injunction "except as expressly authorized by Act of Congress". Section 2283 "is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislature policy is here expressed in a clean-cut prohibition qualified only by specifically defined exceptions". *Amalgamated Clothing Workers* v. *Richman Brothers*,

supra, 348 U. S. at pp. 515-16. And since the Civil Rights Act does not come within the specifically defined exception, the Court is prohibited, as itself stated, from "taking the liberty of interpolation when Congress clearly left no room for it". *Amalgamated Clothing Workers* v. *Richman Brothers, supra*, 348 U. S. at p. 516.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed with appropriate directions for the dismissal of the complaint.

Respectfully submitted,

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Dated: August, 1962.

IN THE

Supreme Court of the United States

October Term, 1962

No. 57

MICHAEL CLEARY,

Petitioner,

—against—

EDWARD BOLGER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NEW YORK STATE DISTRICT ATTORNEYS ASSOCIATION, *AMICUS CURIAE*

NEW YORK DISTRICT ATTORNEYS ASSOCIATION
Amicus Curiae

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Dated: August, 1962.

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BRIEF FOR THE NEW YORK STATE DISTRICT ATTORNEYS ASSOCIATION, *AMICUS CURIAE*

Jurisdiction, Opinions Below and Statutes Involved

The facts of jurisdiction, the citations of the opinions below and the statutes involved are set forth in petitioner's brief herein (pet's. br., pp. 1-3).

Questions Presented So Far As the *Amicus Curiae* Is Concerned

1. Whether respect for the proper balance between the federal government and the several states interdicts a federal court from determining in advance that a state court or agency would erroneously decide a claim of deprivation of du process and therefore enjoining a state agency in advance from considering the matter claimed to violate due process?

2. Whether a federal court can effectively intervene in state proceedings and impose upon a state court or agency a federal law or rule of procedure or evidence which does not involve due process, as, for instance, Rule 5(a) of the Federal Rules of Criminal Procedure, by enjoining a state officer from presenting in such state proceeding evidence which he obtained independently by being a witness thereto—not which was handed to him by federal officers—during the violation of federal law by federal officers?

The Operative Facts

The opinion of the District Court (189 F. Supp. 237) contains a detailed statement of the operative facts involved, and those facts are adopted as established for the purpose of arguing the question presented. Succinctly, they are as follows:

At about 9:00 a.m. of September 12, 1959, two federal customs officers, Patterson and Conlon, took respondent into custody near a pier in New York City, after having had respondent under observation for about an hour (R. 9-10). Upon being questioned later by Patterson and Conlon, respondent admitted that he had contraband in his home in New Jersey (R. 11). At 11 a.m., Patterson, Conlon and another federal officer proceeded from New York City to respondent's home in New Jersey, where a search was conducted and contraband seized (R. 12). Parenthetically, neither petitioner nor any other state officer was present at, and did not participate in, these actions.

The federal officers and respondent returned to Customs Headquarters in New York, arriving there about

4:00 p.m. (R. 12). Ten minutes later, respondent was questioned briefly by Machry, a detective of the Waterfront Commission of New York Harbor, a bi-state agency of the States of New York and New Jersey, and was asked to show his hiring agent's and longshoreman's licenses* (R. 9, 13). A federal officer and petitioner were standing nearby (R. 13). They questioned respondent relative to a key, and the three left headquarters to investigate the matter of the key (R. 13). Finding nothing of consequence, they returned to Customs Headquarters at about 5:45 p.m. (R. 13). A few minutes later, respondent was questioned by two federal officers, which was recorded by a Customs Service reporter (R. 13). Petitioner was present during this questioning but he did not participate in it (R. 13).

A month later, respondent was arrested by New York police and charged with larceny for the theft of part of the contraband which had been found in his home, on which charge a state criminal prosecution was instituted (R. 14). As a result of this, the Waterfront Commission suspended temporarily respondent's licenses as a hiring agent and longshoreman, and set down for hearings the question of the revocation of these licenses, which hearings were deferred until the disposition of the larceny charge (R. 14).

During the pendency of the trial for larceny and the Waterfront Commission hearing, respondent brought an action in the United States District Court for the South-

* Machry was not made a party in the action to enjoin the use of the statements made by respondent claimed to have been unlawfully obtained and therefore inadmissible in evidence. Though it is not specifically so stated, it is therefore assumed that nothing incriminating was produced in this brief questioning.

ern District of New York for injunctions to restrain the federal officers involved and petitioner from testifying in the state court in the trial for larceny or in the proceedings before the Waterfront Commission for the revocation of his licenses as to any evidence obtained by the search and seizure or statements made during his detention (R. 1-5, 8-9).

The District Court found on the facts that the search of respondent's home and the seizure of contraband there, having been made without a warrant, were in violation of the Fourth Amendment of the United States Constitution (R. 27-28) and that the statements made by respondent after 11 a.m., by which time he could have been brought before a commissioner, were made during an unlawful detention in violation of Rule 5(a) of the Federal Rules of Criminal Procedure (R. 26). Thereupon judgment was granted to respondent (1) enjoining and restraining the federal officers from giving testimony in the state criminal proceedings as to evidence obtained during the illegal search and seizure or as to statements made by respondent during the illegal detention (R. 35) and (2) enjoining the federal officers and petitioner from giving any testimony or producing any evidence in the state criminal proceedings or any trial or hearing before the Waterfront Commission as to statements made by respondent during his unlawful detention (R. 36).

POINT ONE

A proper balance between the federal government and the states interdicts intervention by federal courts into state proceedings by prior restraint of state officers or state courts or agencies.

As to the remedy available to respondent against the federal officers for the product of the unlawful search and seizure in violation of the Fourth Amendment and the statements made during the unlawful detention in violation of Rule 5(a) of the Federal Rules of Criminal Procedure, the District Court encountered no difficulty in concluding that it had power to deal with such violations. The court found that because of such transgressions it was "required in the exercise of the supervisory powers of [that] court over federal law enforcement officers, to enforce obedience to the Rules of Criminal Procedure by enjoining the [federal] agents" from testifying in any state criminal or administrative proceeding in respect of the evidence obtained by the illegal search and seizure or the statements made by respondent during his unlawful detention or from turning over such evidence or statements to state officers (R. 30).

But the District Court also found that "[t]he question of whether relief should be granted against [petitioner] is a difficult one." Nevertheless the court also enjoined petitioner from testifying in any state proceedings as to any statements he heard respondent make to federal officers while unlawfully detained by the latter. The rationale for this action by the court, in which the Court of Appeals expressly concurred, was, as hereinafter set forth, a fallacious distinction between *Stefanelli* v. *Minard* (342 U. S.

117) and *Rea* v. *United States* (350 U. S. 214) and a tortuous and erroneous extension of the holding in *Rea*.

In no case has this court ever sanctioned the intervention by a federal court in a state criminal or administrative proceeding by restraining the tribunal itself from receiving or a state officer from presenting evidence which is inadmissible because of the United States Constitution or federal law. It is true that this proposition in that precise framework, or in the framework of the fact situation here presented, has never been presented to this court. However, from the holdings of this court in similar situations, the principle is clear that such intervention is interdicted. Further, in the one case where a federal court dealt with evidence to be used in a state criminal proceedings and claimed to have been obtained unconstitutionally, such action was not directed towards the state officers or state court, or towards the evidence itself, but solely towards federal officers as such. (*Rea* v. *United States*, 350 U. S. 214.)

In *Stefanelli* v. *Minard* (342 U. S. 117) equitable relief was sought from a federal court to prevent the fruits of an unlawful search and seizure by state police from being used in evidence in a state criminal trial. In that case, this court, by Mr. Justice Frankfurter, said (pp. 120-121):

> "We hold that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure. The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law. It is impressively reinforced when not merely the relations between coordinate courts but between coordinate political authorities are in

issue. The special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law, has been an historic concern of congressional enactment, see, e.g., 28 USC §§ 1341, 1342, 2283, 2284(5). This concern has been reflected in decisions of this Court, not governed by explicit congressional requirement, bearing on a State's enforcement of its criminal law. (Citing cases.) It has received striking confirmation even where an important countervailing federal interest was involved. Maryland v. Soper (No. 1), 270 US 9; Maryland v. Soper (No. 2), 270 US 36; Maryland v. Soper (No. 3), 270 US 44.

"These considerations have informed our construction of the Civil Rights Act. This Act has given rise to differences of application here. Such differences inhere in the attempt to construe the remaining fragments of a comprehensive enactment, dismembered by partial repeal and invalidity, loosely and blindly drafted in the first instance, and drawing on the whole Constitution itself for its scope and meaning. Regardless of differences in particular cases, however, the Court's lodestar of adjudication has been that the statute 'should be construed so as to respect the proper balance between the states and the federal government in law enforcement.' Screws v. United States, 325 US 91, 108. * * *."

Then, further demonstrating the desirability of maintaining this separateness of jurisdiction between the federal government and the states, Mr. Justice Frankfurter stated (pp. 123-124):

"The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to

> sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution."

It is true that only state officers and no federal officers were involved in *Stefanelli*. But that does not make the principle there enunciated and the rationale on which it is based less applicable because federal officers may also be involved. In *Wilson* v. *Schnettler* (365 U. S. 381) this court held that a complaint in equity in a federal court to enjoin federal narcotic agents from testifying in a state criminal proceeding on the ground that they had been guilty of an unlawful search and seizure had been properly dismissed. This court, by Mr. Justice Whittaker, said (p. 385):

> "There is still another cardinal reason* why it was proper for the District Court to dismiss the com-

* The Court of Appeals below discounted this ground for this court's holding in *Wilson* and held that this ground did not govern or control because the "basic reason for the court's failure to follow *Rea*" was the failure of the complaint in *Wilson*

plaint. We live in the jurisdiction of two sovereignties. Each has its own system of courts to interpret and enforce its laws, although in common territory. These courts could not perform their respective functions without embarrassing conflicts unless rules were adopted to avoid them. Such rules have been adopted. One of them is that an accused 'should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial.' Ponzi v. Fessenden, 258 U S 254, 259. Another is that federal courts should not exercise their discretionary power 'to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is both clear and imminent: . . .' Douglas v. Jeannette, supra (319 U S at 163)."

The District Court recognized that " • • • the *Stefanelli* case would preclude injunctive relief against [petitioner], in his capacity as a state law enforcement officer • • • " (R. 31). But by a misconstruction of the distinction made in *Rea* between that case and *Stefanelli* and by an unwarranted and erroneous enlargement of the holding in *Rea*, with which the court below agreed, it was held that *Stefanelli* did not apply to petitioner, albeit a state officer, and he,

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to allege the illegality of the seizure and that the decision in *Wilson* "ultimately rested on the insufficiency of the allegations of the complaint" (R. 42). That the court below misconstrued the basis of decision in *Wilson* is manifest. Labelling the second ground of decision in *Wilson* as "another *cardinal* reason" for the court's determination is emphatic and cogent proof that this basis was considered by the court to be of equal weight and value as the question of insufficiency of the complaint.

too, was enjoined from presenting evidence in the state criminal trial and in the state proceeding. The rationale for this conclusion was, in essence, that since petitioner was a witness to the unlawful detention by the federal agents when respondent made the statements heard by petitioner, he was also infected with that transgression and, though not a federal agent, he was also subject to the supervision and control of the court as is a federal agent. That this was a fiction which violated the basic concepts of the power of a federal court to deal with claims such as here presented is clear.

In *Rea* v. *United States* (*supra*), the petitioner was indicted in a federal court for the unlawful possession of marijuana. The court, on petitioner's application, made an order pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure suppressing the evidence on the ground that it had been illegally obtained. Later, on the government's motion, the indictment was dismissed. Thereupon a federal narcotics agent swore to a complaint in a state court, and petitioner was then charged with possession of the same marijuana which the federal court had suppressed as evidence. The entire case against petitioner in the state court would have been made by the testimony of the federal agent based on the illegal search and on the illegally seized evidence. In enjoining the federal agent from testifying in the state case, the court did not do so on the basis of any power to intervene in state proceedings. The court said (pp. 216-217):

> "We put all the constitutional questions to one side. We have here no problem concerning the interplay of the Fourth and the Fourteenth Amendments nor the use which New Mexico might make of the evidence.

The District Court is not asked to enjoin state officials nor in any way to interfere with state agencies in enforcement of state law. Cf. Boske v. Comingore, 177 U S 459. The only relief asked is against a federal agent, who obtained the property as a result of the abuse of process issued by a United States Commissioner. The property seized is contraband which Congress has made 'subject only to the orders and decrees of the courts of the United States having jurisdiction thereof,' as provided in 28 U S C 2463, already quoted. In this posture we have then a case that raises not a constitutional question but *one concerning our supervisory powers over federal law enforcement agencies.* Cf. McNabb v. United States, 318 U S 332.

"A federal agent has violated the federal Rules governing searches and seizures. Rules prescribed by this Court and made effective after submission to the Congress. See 327 U S 821, et seq. The power of the federal courts extends to policing those requirements and making certain that they are observed. As stated in Wise v. Henkel, 220 U S 556, 558, which involved an order directing the district attorney to return certain books and papers unlawfully seized:

"'. . . it was within the power of the court to take jurisdiction of the subject of the return and pass upon it as the result of its inherent authority to consider and decide questions arising before it concerning an alleged reasonable exertion of authority in connection with the execution of the process of the court.'

"*No injunction is sought against a state official. The only remedy asked is against a federal agent who, we are told, plans to use his illegal search and seizure*

> *as the basis of testimony in the state court.* To enjoin the federal agent from testifying *is merely to enforce the federal Rules against those owing obedience to them.*
>
> "The command of the federal Rules is in no way affected by anything that happens in a state court. They are designed as standards for federal agents. The fact that their violation may be condoned by state practice has no relevancy to our problem. Federal courts sit to enforce federal law; and federal law extends to the process issuing from those courts. The obligation of the federal agent is to obey the Rules. * * *." (Emphasis supplied.)

Nevertheless, the District Court erroneously construed this holding as follows (R. 32):

> "If no injunction can be issued against [petitioner] he is in a position to testify in the state court proceedings as to [respondent's] admissions before the federal agents and thus to act as a vehicle to defeat the policy enunciated in the *Rea* case of protecting the privacy of the citizen against invasion in violation of the federal rules. Thus, the federal agents would be able to flout the rules and to use the fruits of their unlawful conduct in the state proceedings through the medium of [petitioner]."

The *Rea* case, however, did not pronounce a general policy by the federal courts "of protecting the privacy of the citizen against invasion in violation of the federal rules." If it did, then it overruled *Stefanelli* and the cases dealing with state violations of non-constitutional federal rights of privacy, such as *Pugach* v. *Dollinger* (365 U. S. 458), and *Schwartz* v. *Texas* (344 U. S. 199, 201-202), which refused to enjoin in a state court the divulgence of intercepted tele-

phone conversations in violation of section 605 of the Federal Communications Act, held by this court to be inadmissible in evidence in a federal prosecution (*Nardone* v. *United States*, 302 U. S. 379, 382; 308 U. S. 338, 339), or such as *Stein* v. *New York* (346 U. S. 156, 187-188) and *Gallegos* v. *Nebraska* (342 U. S. 55, 64), in which this court held that the rule of federal courts that statements made during unlawful detention in violation of Rule 5(a) of the Federal Rules of Criminal Procedure are not admissible in evidence (*Mallory* v. *United States*, 354 U. S. 449, 455; *McNabb* v. *United States*, 318 U. S. 332, 344-345) is not binding upon the states. But it is clear that *Rea* was not intended to and did not overrule the principle announced in those cases by this court. What *Rea* held, and which the District Court apparently misconstrued or overlooked, was that the injunctive relief which was there granted derived from that court's "supervisory powers over federal law enforcement agencies" (p. 217) and because the evidence had previously been, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, suppressed in a pending proceeding in that court and rendered "not admissible in evidence at any hearing or trial." These principles—which do not apply to the instant matter—were recognized in *Wilson* v. *Schnettler* (*supra*) as the rationale of the holding in *Rea*, as follows (pp. 625-626):

> "Notwithstanding all of this, petitioner contends that the averments of his complaint were sufficient to entitle him to the relief prayed under the principles announced in Rea v. United States, 350 U S 214. But it is plain that the averments of this complaint do not invoke or even approach the principles of the Rea Case. That case did not hold, as petitioner's

contention assumes, that narcotic drugs lawfully seized by federal officers are inadmissible, or that such officers may not testify about their seizure, in state prosecutions. Such a concept would run counter to the express command of Congress that federal officers shall cooperate with the States in such investigations and prosecutions. See 21 U S C §198(a). Indeed, the situation here is just the reverse of the situation in Rea. There, the accused had been indicted *in a federal court* for the unlawful acquisition of marihuana, and had moved in that court, under Rule 41(e) of the Federal Rules of Criminal Procedure (18 U S C Rule 41(e)), for an order suppressing the use of the marihuana as evidence at the trial. After hearing, the District Court, finding that the accused's arrest and search had been made by federal officers under an illegal warrant issued by a United States Commissioner, granted the motion to suppress. The effect of that order, under the express provisions of that Rule, was that the suppressed property 'shall not be admissible in evidence at any hearing or trial.' Cf. Reina v. United States, 364 U S —; 5 L ed 2d 249. 81 S. Ct. 260, 262, 263. Despite that order, one of the arresting federal officers thereafter caused the accused to be re-arrested and charged, in a state court, with possession of the same marihuana in violation of the State's statute, and threatened to make the State's case by his testimony and the use of the marihuana that the federal court had earlier suppressed under Rule 41(e). Thereupon, to prevent the thwarting of the federal suppression order, petitioner moved the federal court to enjoin that conduct. That court denied the motion and its judgment was affirmed on appeal. On certiorari, this Court, acting under its supervisory power over the federal rules, 'which extends to policing (their) requirements and making certain

> that they are observed,' 350 U S, at 217, reversed the judgment, because 'A federal agent (had) violated (and was about further to violate) the federal Rules governing searches and seizures—Rules prescribed by this Court and made effective after submission to the Congress. See 327 U S 821, et seq.' 350 U S, at 217.
>
> "How different are the facts in the present case! Here there is no allegation or showing that any proceedings ever were taken against petitioner under any federal rule or in any federal court.' * * *."

From the foregoing it also follows that the extension by both courts below of the principle in *Rea* to give a federal court power to enjoin those who are not in fact federal officers but who are witnesses to the acts of federal officers is fallacious indeed. The District Court held that petitioner should be enjoined "not in his capacity as a state official but because he participated as a witness in the unlawful acts of the federal officers on behalf of the United States"; that "[s]uch participants are properly within the orbit of the power of the federal courts to enforce rules against federal agents owing obedience to them" (R. 33). The Court of Appeals agreed that petitioner was "not being enjoined in his capacity as a state official, but as a witness invited to observe illegal activity by federal agents" (R. 41), as to which witnesses a federal court has the same power of injunction as it has against a federal agent.

But the fact is to the contrary. It is utterly unrealistic to categorize petitioner as a witness and not a state official. It is indisputable that petitioner was in Customs Headquarters as an official of the Waterfront Commission; that what he saw and heard was not as a casual witness but as

a Waterfront Commission officer; and that he would testify in the state proceedings, particularly the administrative proceedings before the Waterfront Commission, as an official of that body. By no theory did petitioner, by the mere fact of being a witness, while present as a Waterfront official, to an interrogation by federal agents during an illegal detention, become a "federal law enforcement agent." Moreover, the supervisory powers exercised by the federal court in *Rea* was not to vindicate the failure to comply with a federal Rule; it was exercised rather, as pointed out in *Wilson*, upon a federal agent to enforce, and to prevent violation of, a prior order of that court.

The further rationale given by the courts below for their holding—that the power of the federal court to enjoin the use of evidence obtained in violation of federal law must be extended to non-federal officers to prevent a frustration of that power—is equally untenable. The power in the court to act in a state proceeding is derived not from the violation of federal law but rather from its supervisory control over federal officers. This power and jurisdiction of supervisory control may not be extended to other than federal agents solely because not so to extend them would prevent the federal court from exercising jurisdiction in a state proceeding over matter which violates federal law. To permit such extension of power would be an unwarranted assumption of control over those who are not subject to the jurisdiction of the court and, in a case such as this, an unwarranted invasion of the rights and powers of the states.

Three other aspects of the matter remain to be considered. Firstly is the proposition that the prior restraint here imposed upon a state official is bottomed upon the

postulate that the courts and administrative agencies of New York State would act erroneously in violation of respondent's constitutional rights and in violation of non-constitutional federal law. That this is in direct violation of the principle of proper balance between the federal government and the states is manifest. This is precisely the development which Mr. Justice Frankfurter warned against in *Stefanelli* (*supra*, pp. 7-8).

Secondly, the principle in the opinions in the courts below in this case creates a situation that wherever federal and state officers may be acting on the same case as to one individual, the one for violation of federal law and the other for violation of state law, the federal rules of procedure, whether as to a constitutional right or not, will supersede and bind the state courts. This would be an unwarranted usurpation by the federal government of rights retained by the states. As was eloquently said by Judge Anderson in his dissent below (R. 46-7):

> "To attempt to base a rule on the degree or weight of the state agent's participation in a joint enforcement endeavor is wholly impractical. Either the law should be that the use in the state courts of all evidence obtained by state agents, illegally under federal rules or statutes, shall be enjoined by the district courts where, in procuring that evidence, the state agents have been assisted in whole or in part by federal agents; or the law should be that the admissibility of such evidence in the state courts shall be left wholly in the power of the state courts. The majority decision which leans toward the former principle means that in every case where there has been any degree of 'commendable cooperation' between federal and state enforcement officers, and

there are involved federal constitutional rights which the states must recognize, the states are also bound to recognize and apply federal statutes or rules of procedure, made to implement and preserve them, or have their state proceedings disrupted by a federal court's injunction, if they fail to do so. To require the states to follow and apply congressional enactments and the rules of the federal courts in this fashion would constitute a long step toward the destruction of the division of powers. It is directly contrary to *Pugach* v. *Dollinger*, 365 U. S. 458 (1961).

Moreover, the practical consequence would be that in nearly all cases where there had been any contact at all between federal and state enforcement officers, leading to a state prosecution, a question would be raised in the district courts by means of a petition for an injunction to determine whether or not such federal statutes or rules had been complied with. Meanwhile, the district court would be compelled to stay the state court proceedings until it had had an opportunity to hear and decide the matter. It takes no major prophet to envisage the [fol. 56] 'insupportable disruption' which would result., *Stefanelli* v. *Minard*, 342 U. S. 117, 123-125 (1951)."

Thirdly, and not least, is the implicit but strong imposition upon the states of federal non-constitutional Rules and statutes where federal and state agents are involved in a matter because federal as well as state laws may have been violated. It is true that the District Court did—in a rather oblique fashion—condemn respondent's statements as the fruit of the illegal search and seizure (R. 29), which is the infringement of a constitutional right. It is clear, however, that this was a subordinate and secondary consideration, and that the basic rationale for holding the

statement inadmissible was the fact that it was made during an unlawful detention in violation of Rule 5(a) of the Federal Rules of Criminal Procedure. The court said (R. 29):

> "It needs no further discussion to demonstrate that the incriminating statement was the result of a clear violation of Rule 5(a) of the Federal Rules of Procedure by the agents and of the illegal search and seizure • • •. The same applies to any other incriminating statements made by him after he left with the agents for New Jersey when his unlawful detention began. See *Mallory* v. *United States*, *supra*; *McNabb* v. *United States*, *supra*."

This, as is so forcefully delineated in the above quotation from the dissent of Judge Anderson, would result in constituting federal law and rules not in a constitutional area binding upon the states.

CONCLUSION

To preserve the proper balance between the federal government and the states, the assumption of supervision by the federal court over petitioner and the concomitant effective intervention into state proceedings cannot stand.

Respectfully submitted,

NEW YORK DISTRICT ATTORNEYS ASSOCIATION
Amicus Curiae

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Dated: August, 1962.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 57

MICHAEL CLEARY,

Petitioner,

—v.—

EDWARD BOLGER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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Opinions Below

The opinion of the District Court (R. 7-34) is reported at 189 F. Supp. 237. The opinion of the Court of Appeals (R. 38-47) is reported at 293 F. 2d 368.

Jurisdiction

The judgment of the Court of Appeals was entered on August 4, 1961 (R. 48).

Petition for rehearing *in banc* was denied on September 25, 1961, by the same panel of the Court of Appeals as originally sat on the instant case (R. 49-50). Then, the Court of Appeals, sitting *in banc*, divided three to three on

the petition for rehearing and accordingly denied rehearing on September 26, 1961, for lack of a majority in favor thereof (R. 51-52). An application by petitioner for leave to refile his petition for rehearing *in banc* was denied by all the active judges of the Court of Appeals on October 20, 1961 (R. 53).

The petition for certiorari was filed December 23, 1961, and was granted February 19, 1962.

Statutes Involved

Section 2283 of Title 28 provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Rule 5(a) of the Federal Rules of Criminal Procedure provides:

> "Rule 5. Proceedings before the Commissioner.
>
> (a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without necessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

Rule 41(a) of the Federal Rules of Criminal Procedure provides:

> "Rule 41. Search and Seizure.
>
> (a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record or by a United States commissioner within the district wherein the property sought is located."

Questions Presented

1. Does a judge of the United States District Court have the power (in equity) to enjoin a person (who happens to be employed as an investigation officer by the Waterfront Commission of New York Harbor) from testifying against the respondent in a state criminal case and also in a state administrative proceeding, where such person (petitioner) was present but did not participate in the questioning of the respondent (though he was free to do so if he desired) while respondent was illegally detained by federal customs officers.

2. Whether such injunction is prohibited by the provisions of Section 2283 of Title 28 of the United States Code.

Statement

The order of the District Court herein (R. 35-37) enjoins petitioner Cleary (not in his capacity as an investigator for the Waterfront Commission of New York Harbor) from testifying or producing any evidence against the respondent Bolger (1) in a criminal proceeding pending in the Criminal Court of the City of New York (formerly

the Court of Special Sessions of the City of New York) for the crimes of petit larceny, etc., and (2) in a hearing pending against Bolger before the Waterfront Commission to determine whether to revoke or suspend Bolger's license as a hiring agent and Bolger's registration as a longshoreman. Contrary to the assertion of petitioner that Cleary has no evidence to produce against Bolger, Cleary does in fact have evidence, the confessions made by the respondent which may or may not be competent in the prosecution pending in the Criminal Court of the City of New York and the proceeding pending before the Waterfront Commission. Whether or not the prosecution in the Criminal Court of the City of New York and the proceeding was pending before the Waterfront Commission at the time this injunction was issued or at the time the injunction proceedings were commenced is not in point.

The material facts with respect to the federal officers (including Dorothy Zecchа, stenographer) are: Bolger was arrested September 12, 1959 in the early morning by federal customs agents and held until the evening of that day. The federal agents did not have a warrant for his arrest, nor did they have a warrant to search his person, his automobile or his home in Keansburg, New Jersey. At no time did the Federal agents arraign Bolger before a United States Commissioner or a District Court Judge in the Southern District of New York where he was originally placed under arrest, although a United States Commissioner was on duty in the Court House, Foley Square, City and County of New York. Customs Officers Conlon and Patterson, after observing Bolger carrying cardboard cartons from the pier and placing them in his automobile, followed Bolger after he entered his automobile and ordered him to stop. Bolger stopped. He was ordered from his automobile. Conlon and Patterson proceeded to search his auto-

mobile and found therein empty soda water bottles in the car and in the trunk. In the glove compartment the officers found some spark plugs and window wipers stamped "Made in England". Bolger was taken into custody and they all drove south. Bolger was originally seen at Pier 57, North River, 14th Street. He was stopped at about Christopher Street, North River. The officers stopped at Pier 42, North River and proceeded to make some telephone calls. Bolger asked Officer Patterson for permission to make a telephone call but Patterson refused to permit him to make a call, telling him he would be permitted to call later. They drove to the vicinity of 54 Stone Street and Bolger was taken into the Customs Officer there. Bolger again asked to use the telephone and was again refused. At about 10 o'clock A.M. Agents O'Shea and Loughman arrived at 54 Stone Street. At about 10:30 o'clock, after some preliminary questions, Bolger was taken into a separate room by Officer O'Shea and admitted that he had some thirty or forty bottles of liquor in his home purchased from seamen and also some other merchandise. Later Bolger signed a consent to search his home at 80 Willis Avenue, Keansburg, New Jersey. It was witnessed by O'Shea. (The Court, Bryan, *J.* found that Bolger refused to sign the consent without consulting a lawyer.) About 11:00 A.M. Officers Patterson, Conlon, O'Shea and Loughman, together with Bolger, left 54 Stone Street and proceeded to 80 Willis Avenue, Keansburg, New Jersey. They arrived about noon. At O'Shea's direction Bolger led O'Shea to a bedroom closet where they found some 75 bottles of assorted liquor. O'Shea then searched other parts of the house and found various articles of merchandise. During most of the search Bolger remained in the dining room with one of the other agents and Mrs. Bolger accompanied O'Shea while he continued the search. In Mrs. Bolger's bedroom a Stenorette tape recording

machine was found of West Germany make. The agents and Bolger left for New York at about 2:00 o'clock P.M. after searching for about two hours. The agents took all the merchandise found in Bolger's house. They all arrived in New York at about 4:00 o'clock P.M., and went to 201 Varick Street, Manhattan, headquarters of the Customs Service. The Waterfront Commission of New York Harbor had been advised of Bolger's arrest. About ten minutes later Cleary (petitioner) arrived.

The material facts concerning the petitioner, Cleary, are: the Waterfront Commission was notified by the federal customs officers that the petitioner, Bolger, was in their custody (R. 12-13); Cleary arrived at the Varick Street office of the Customs officers; Customs Officer Loughman and petitioner, Cleary, asked respondent to produce his key ring, and in answer to questions put by Loughman, respondent told him that one key would open the door to a store room in an apartment house at 75th Street and West End Avenue; the respondent was taken by both Loughman and Cleary to this storeroom and compelled to open the door and a search was made of this storeroom by both Loughman and Cleary. They found nothing that was contraband. Bolger was taken back to Varick Street and there questioned by the federal customs officers in the presence of petitioner and a stenographer was present who recorded in shorthand the questions put to respondent and the answers made by him. Bolger was released from custody at about 7:30 P.M. after being warned to keep himself available for further questioning. He was never questioned further by the federal customs officers and no charges were made against him by the federal authorities. Although a United States Commissioner was available Bolger was not taken before him, nor was any attempt made to arraign him before any judicial officer. No attempt was made by

the federal officers to obtain a search warrant. Counsel was not available to Bolger, although he requested permission to telephone and secure counsel and on at least two occasions he was refused permission to use a telephone. He (Bolger) was not advised of his right to an immediate arraignment or of his right to secure counsel. Bolger was arrested by the police of New York City about one month later on a charge of Criminally Receiving Stolen Property (Stenorette Tape Recorder found during the search of his home on September 12, in Keansburg, New Jersey). Subsequently the Waterfront Commission filed charges against Bolger and made an Order temporarily suspending his license as a hiring agent and his registration as a longshoreman. Respondent, Bolger, thereafter commenced the action for an injunction and also made a motion for a temporary injunction. Upon the hearing for a temporary injunction, that proceeding was combined with the trial of the action for an injunction. The final decision of the Court (Judge Frederick v.P. Bryan) resulted in an injunction against petitioner, Cleary, enjoining him from giving any testimony or producing any evidence or statements either oral or in question and answer form obtained by him from the defendants William J. O'Shea, Thomas F. Loughman, Walter J. Conlon, Joseph E. Patterson and Dorothy T. Zecha on September 12, 1959 in any State criminal proceedings against respondent, Bolger, and also, enjoining petitioner, Cleary, from giving any testimony, or producing any statements in question and answer form, or other statements or producing any evidence before the Waterfront Commission of New York Harbor at any hearing or trial conducted by the said Waterfront Commission of New York Harbor against respondent, Bolger.

POINT I

Cleary Became a Federal Agent Acting in Behalf of the United States When He Joined the Federal Customs Agents by Their Invitation and Participated in Their Unlawful Acts.

When the federal agents returned from the house of respondent in Keansburg, New Jersey and brought him to 201 Varick Street, City and County of New York, petitioner, Cleary, joined with the federal customs agents at 201 Varick Street and participated with the federal agents, at their invitation, in certain actions taken by the federal agents.

Cleary aided and abetted federal agent Loughman in the specific act of compelling respondent to empty his pockets; also aided and abetted Loughman in questioning respondent with respect to the various keys on a key-ring taken from respondent's pocket; upon being told that one key fitted the lock to a storeroom located in an apartment house at 75th Street and West End Avenue, City and County of New York, Loughman, together with petitioner Cleary forcibly took the respondent to these premises, compelled him to open the door and search the storeroom. The fact that Loughman and Cleary did not find any contraband in this storeroom does not excuse the illegal actions taken by both Loughman and Cleary. The federal agents combined together and formed a conspiracy to deprive respondent of his constitutional rights. Petitioner. Cleary, joined in this illegal conspiracy when he, together with federal agent Loughman compelled petitioner to empty his pockets; when he together with Loughman questioned respondent with respect to the keys, and upon ascertaining that one key fitted the storeroom compelled respondent to go to

this storeroom, open the door and then Cleary and Loughman conducted a search therein.

Petitioner, in his brief (page 15), states that the granting of the injunction was in conflict with the applicable decisions of this Court. (Citing *Stefanelli* v. *Minard*, 342 U.S. 117.) The *Stefanelli* case is not in point. That case deals solely with the right of the State of New Jersey police officers to use evidence in a criminal prosecution in the State of New Jersey Courts claimed to have been obtained by an unlawful search and seizure.

The facts in this case are entirely different from the *Stefanelli* case. In this case the federal officers violated the Federal Rules. (Rule 5(a) and Rule 41(a) Federal Rules of Criminal Procedure.) Cleary, petitioner, is employed by the Waterfront Commission of New York Harbor. He arrived at Varick Street by the direct invitation of the Federal Officers, as a representative of the Waterfront Commission.

Cleary, after his arrival at Varick Street joined with and aided and abetted the federal officers in committing further acts in violation of the Federal Rules of Criminal Procedure. By joining with the federal officers and committing illegal acts together with the federal officers, Cleary became a federal officer with respect to this case. The fact that he is an investigator employed by the Waterfront Commission is immaterial. As was said, in the opinion of the Court of Appeals, Second Circuit (Clark, *J.*):

> "But the defendant Cleary is not being enjoined in his capacity as a state official, but as a witness invited to observe illegal activity by federal agents. If the court can enjoin federal agents from passing on the fruits of their illegal activity to the state, the court has power to make its decree effective by extending the

injunction to any third party invited by the federal agents to witness the securing of statements or other evidence. That the third party happens also to be a state official is not, in our view, an excusing circumstance."

The petitioner, in his brief (page 20, (2)) states:

"The 'insupportable disruption' of state law enforcement proceedings which was referred to in Stefanelli has become a harsh reality in this case. * * * Thus, the State's criminal prosecution and the Commission's revocation proceedings have been both required to mark time for three years pending the outcome of this litigation * * * "

No injunctive relief was asked for or granted against the State of New York, nor against the Waterfront Commission. (A separate action for an injunction was commenced against the Waterfront Commission for an injunction and such action was dismissed. This action was not before the Court of Appeals, no appeal having been taken, and therefore is not before this Court.) (Transcript of Record, pages 33, 34.)

The State of New York is the plaintiff in the action now pending in the Criminal Court of the City of New York (formerly Court of Special Sessions, City of New York, New York County). The General Construction Law, Section 18-a reads:

"§18-a. Criminal Action

A 'criminal action' is prosecuted in the name of the people of the state of New York, as plaintiffs, against a party charged with crime."

The State of New York is free to proceed against the respondent in the criminal prosecution now pending in the Criminal Court of the City of New York. And, so far as the Waterfront Commission is concerned, that body is not enjoined from proceeding with the hearing to determine what, if any, punishment by way of suspension or revocation of respondent's "hiring license" and "registration as a longshoreman" they may decide upon.

The respondent does not know what evidence the District Attorney of New York County may be able to produce against him in the criminal prosecution, nor does the respondent know what evidence may be produced against him on the hearing pending before the Waterfront Commission.

The petitioner in his brief (page 21) states:

> "The disruptive effect which the injunction here would have upon state law enforcement proceedings was cogently pointed out by Judge Anderson in his dissent in the court below, wherein he stated (R. 47):
>
> "* * * Meanwhile, the district court would be compelled to stay the state court proceedings until it had had an opportunity to hear and decide the matter. * * *"

As heretofore stated, the State of New York is not enjoined from proceeding with the criminal trial, nor is the Waterfront Commission enjoined from proceeding with the hearing. So it would appear that Judge Anderson statement, quoted above from his opinion, is incorrect.

The petitioner, in his brief (page 21) states:

> "An affirmance here would inevitably beget a large progeny of cases seeking to apply or extend this case. It would become a common defense tactic to seek to

delay and obstruct a state prosecution by applying to the federal courts for an injunction."

The securing of the injunction by the relator in this case did not delay the prosecution, if the prosecution had any legal evidence upon which to proceed.

The petitioner, in his brief (page 22) states:

"If federal rights have been violated, those rights may, and should be, asserted in the usual and time-honored manner at law in the state prosecution subject to the ultimate review available in this Court."

This argument may have some merit if a defendant in a criminal case, after being convicted upon illegal evidence could be freed pending the review of his conviction by the appellate courts of the particular state and then finally, if unsuccessful, seek a review in this Court by way of a petition for a writ of certiorari. But as a practical matter, when the time arrived for the defendant to seek a review in this Court, his prison term would have expired and the question would have become academic.

The petitioner's argument would seem to indicate that he favors the abolition of all injunctions since the issues that could be resolved in an action for an injunction could very well be disposed of in a trial.

The sole question before this Court is: "did Cleary, by aiding and abetting, and acting in concert with the federal agents in their illegal operations, become a federal agent, and thus became amenable to the Federal Rules of Criminal Procedure?" The District Court (Bryan, *J.*) held (Transcript of Record, page 37):

"• • • In effect, Cleary was a human recorder of the questions which were put to Bolger and the answers which he gave.

If no injunction can be issued against Cleary he is in a position to testify in the state court proceedings as to Bolger's admissions before the federal agents and thus to act as a vehicle to defeat the policy enunciated in the Rea case of protecting the privacy of the citizen against invasion in violation of the federal rules. Thus, the federal agents would be able to flout the rules and to use the fruits of their unlawful conduct in the state proceedings through the medium of Cleary. * * *."

Judge Bryan further said (Transcript of Record, pages 37, 38):

"If Cleary had been a private citizen called in by the federal agents to be a witness to incriminating statements unlawfully obtained from Bolger, he would surely not be insulated against appropriate action by the federal courts to enforce the federal rules. The fact that he was a state agent does not insulate him either or permit him to be used as a shield to enable the federal officers to violate plaintiff's right with impunity. * * * Cleary will be restrained not in his capacity as a state official but because he participated as a witness in the unlawful acts of the federal officers acting on behalf of the United States. Such participants are properly within the orbit of the power of the federal courts to enforce the rules against the federal agents owing obedience to them. * * *"

It thus appears, from the opinion rendered by Judge Bryan, that he found that Cleary was, in effect for the purposes of this case, a federal agent.

The opinion of the Court of Appeals, Second Circuit (Clark and Waterman, Circuit Judges, and Anderson, Dis-

trict Judge), Judge Clark said (in the majority opinion) (Transcript of Record, page 40):

> " • • • It is urged that a consideration for the proper balance between the state and federal governments requires the federal court to stay its hand in the present case, lest the work of the state courts be unduly disrupted.
>
> The answer to this contention is that the federal courts will make an exception to this principle of no interference in order to insure that federal officers comply with the requirements of fair criminal law administration as set forth in the Federal Rules of Criminal Procedure. • • • We think the Rea case compels the conclusion that the order below was proper. In Rea, a federal official was disabled from passing the fruits of his illegal activities on to the state through testimony at trial. In the present case the federal officials attempted to pass the fruits of their illegal activities on to the state by calling in state officials at the time of the illegal detention. If the integrity of the judicial process stated in the Federal Rules of Criminal Procedure is not to be subverted by the former method, it must be similarly protected against subversion through the latter method. The only difference between the two cases is the time at which the federal officials (fol. 49) attempt to make the results of their law-breaking available to the state. We do not think that this difference justifies a distinction in law, or justifies so easy a means of evading federal law for the protection of the accused. • • • "

The respondent herein relies solely, as he did in the District Court and in the Court of Appeals upon *Rea v. United States*, 350 U.S. 214.

The respondent urges that Cleary, respondent, having joined in with, and aided and abetted the federal agents in their illegal activities, became a principal in the law-breaking activities of the federal agents. Cleary cannot now be heard to say: "I did aid and abet the federal agents in their law-breaking activities. I was present and I heard Bolger make admissions of a very incriminating nature. But, I am a State Official; I am an investigator employed by the Waterfront Commission of New York Harbor. No federal process, injunction or otherwise, can prevent me from using the evidence I secured in a State Proceeding or in a Proceeding before the Waterfront Commission."

If federal agents who flagrantly violate the Federal Rules of Criminal Procedure, can be permitted to call in other persons to aid and abet them in their unlawful activities, and if the persons called in, happen to be state officials, can be permitted to say that they are not amenable to federal process or answerable to the Federal Rules of Criminal Procedure because they are state officials, then the Federal Rules of Criminal Procedure become empty words and meaningless.

Judge Anderson, in his opinion states (Transcript of Record, page 43):

> "While I agree with the majority opinion that Judge Bryan's order should be affirmed, I am of the opinion that, as a result of the intervening decision of the Supreme Court in Mapp v. Ohio, June 19, 1961, the injunction should now be dissolved. I must therefore, dissent from that portion of the majority's decision which continues the injunction in effect."

It would therefore seem that all the Judges of the Court of Appeals are in agreement that there was a clear violation of the Federal Rules of Criminal Procedure.

Judge Anderson further states (Transcript of Record, page 45):

> "* * * To bring the present case within the 'fall-out' area of Rea the majority say 'the federal officials attempted to pass the fruits of their illegal activities on to the state by calling in state officials at the time of the illegal detention.' This finding of intent and purpose was never made by the trial court. * * * Nowhere is there anything to indicate that this invitation and cooperation was part of an evil purpose of the federal agents to 'attempt to pass the fruits of their illegal activities on to the state' to promote a prosecution there, which could not be carried out in the federal court."

The respondent urges that Judge Bryan did make a finding that: (1) Cleary became a human recorder of the questions which were put to Bolger and the answers made by him; (2) that Cleary aided and abetted the federal agents when he together with Agent Loughman compelled Bolger to empty his pockets and both did question him about the keys on a key ring. That upon ascertaining that one key fitted the lock on a storeroom located in an apartment building at 75th Street and West End Avenue, Cleary, together with Agent Loughman compelled Bolger to go with them to this address and compelled Bolger to open the door and then Cleary, together with Agent Loughman proceeded to search this room. The fact that no contraband was found does not legalize the unlawful entry and search conducted by Cleary and Loughman (Transcript of Record, as to (1) page 32; as to (2) page 13).

The respondent further urges that Judge Bryan did make a finding that unless Cleary was enjoined he would be in a position to testify in the state court proceedings as to Bolger's admissions before the federal agents and thus "Cleary would become a vehicle to defeat the policy thus enunciated in the Rea case of protecting the privacy of the citizen against invasion in violation of the federal rules" (Transcript of Record, page 32).

The respondent urges that the findings above set forth clearly establish that Cleary would attempt to use the admissions and confessions made by Bolger in his presence to the federal agents in the State criminal proceedings and in the proceedings before the Waterfront Commission, and that Judge Bryan's conclusions are bottomed on the fact that criminal proceedings are pending in the Criminal Court of the City of New York and that proceedings are pending before the Waterfront Commission.

The evidence adduced upon the trial in the District Court established that the federal agents "did have an evil purpose" in that all of their actions were illegal as was found as a fact by the Trial Court. In the opinion of Judge Bryan, he states (Transcript of Record, page 26):

> "I find that Bolger's detention after the commencement of the trip to New Jersey shortly before 11 o'clock in the morning of September 12, 1959 constituted unreasonable delay in bringing him before a commissioner in violation of Rule 5(a) and that such unreasonable delay continued until he was released at 7:30 P.M. some 8½ hours later, without any charges whatsoever having been made against him."

When the federal agents returned with Bolger from New Jersey to 201 Varick Street, New York County, they were

then engaged in illegal activities. Cleary joined the federal agents in their illegal activities at 201 Varick Street about ten minutes after the federal agents arrived at 201 Varick Street (about 4 o'clock P.M.). Cleary continued in the illegal activities, having joined the federal agents, until about 7:20 o'clock P.M.

Judge Anderson further states in his opinion (Transcript of Record, page 45):

> "• • • The most said by the trial court in its finding was, 'The Waterfront Commission, which worked in close cooperation with the Customs Service, had been informed of Bolger's detention.' Later in its discussion the trial court said: 'He (Cleary) was present at the questioning as a representative of the (fol. 54) Waterfront Commission • • • This was the result of the commendable cooperation between the Customs Service and the Commission who were both concerned with law enforcement on the waterfront.' • • • •"

This statement found in the opinion of Judge Bryan (Transcript of Record, pages 12, 31), certainly does not mean that illegal cooperation between the Customs Service and the Waterfront Commission is commendable. This statement of Judge Bryan is a general statement, and does not apply to this case, since in this case the federal agents were engaged in illegal activities and Cleary joined together with them in their illegal activities.

Judge Anderson states, in his opinion (Transcript of Record, page 44):

> "There is no question that in the present case Bolger's confession was procured through violations of Rule 5(a) F.R. Crim. P. and of the Fourth Amendment. • • •"

Since there can be no question that the federal agents were engaged in illegal activities and that Cleary joined with the federal agents in their illegal activities, there can be no doubt that Judge Bryan, in speaking about the "commendable cooperation between the Customs Service and the Waterfront Commission" means the legal cooperation. Certainly not "illegal cooperation".

Judge Anderson further states in his opinion (Transcript of Record, pages 45, 46):

> " • • • Cleary was not present at the confession merely as a casual by-stander or as a witness or as a 'human recorder'; he was a law enforcement officer of the State of New York, present in the course of his official duties."

It may be true that Cleary was present in the capacity of a law enforcement officer of the State of New York, present in the course of his official duties, but when he joined with the federal agents in their unlawful acts, he, in effect became a federal agent, since the unlawful acts engaged in by the federal officers were done on behalf of the United States.

Judge Anderson, in his opinion, then goes on to say (Transcript of Record, page 46):

> "There was good reason at the time of the issuance of the injunction by the trial court, before the Supreme Court's holding in Mapp v. Ohio, supra, to include within its reach, Cleary, the state official, to prevent a violation of Bolger's constitutional rights, for Bolger then had no other recourse. • • • "

From the above statement the only fair inference that can be drawn is that Judge Anderson did find that Cleary

joined with and engaged in the unlawful activities of the federal agents.

It would seem that the only difference of opinion between the majority opinion and Judge Anderson's opinion is that on the one hand, the majority opinion believes that *Mapp* v. *Ohio, supra*, does not protect Bolger against the danger of having Cleary testify with respect to his confessions, and, on the other hand, Judge Anderson believes that the Federal Rules do not permit a Federal Court to enjoin a person from testifying in a State Court criminal proceeding or in a proceeding before the Waterfront Commission, even though such person has joined with and engaged in unlawful activities with federal agents in violation of the Federal Rules of Criminal Procedure. Judge Anderson is of the opinion that whether a person can be prevented from testifying in a State criminal proceeding and before the Waterfront Commission is solely a question to be decided by a particular State, and any action by a Federal Court is an invasion of the rights and powers of states. (See Transcript of Record, page 46.)

It would seem that Judge Anderson is of the opinion that the law should be made clear whether state agents can be enjoined in the use of all evidence obtained by state agents illegally under federal rules, when, as in this case, state agents have been called in by federal agents to aid and abet such federal agents in their illegal activities, or whether the admissibility of such evidence in a State Criminal Proceeding and a proceeding before the Waterfront Commission should be left wholly in the power of the state courts.

Judge Anderson seems to be of the opinion that the majority opinion, which leans towards the former principle, means that in every case where there has been any

degree of "commendable cooperation" between federal and state enforcement officers and there are involved federal constitutional rights which the states must recognize, the states are also bound to recognize and apply federal statutes or rules of procedure, made to implement and preserve them, or have their state proceedings disrupted by a federal court's injunction, if they fail to do so (Transcript of Record, page 46).

Petitioner urges that the majority opinion and the opinion of Judge Bryan (District Court) does not hold that there has been "commendable cooperation". In fact, the holding is otherwise. The holding is that the actions of the federal agents and Cleary, acting together and in concert, were unlawful. If the District Court and the Court of Appeals had found that what the federal agents and Cleary did resulted in "commendable cooperation" they would have praised their actions, and would not have termed them "illegal and unlawful".

Furthermore, the injunction does not run to the criminal proceedings pending in the New York State Criminal Court or to the proceeding pending before the Waterfront Commission. Each of the proceedings pending in the State Criminal Court and before the Waterfront Commission may proceed. It may very well be that without the testimony of Cleary and the federal agents the State of New York, who is the plaintiff in the criminal action pending in the Criminal Court of the City of New York (formerly Court of Special Sessions) and which action is prosecuted by the District Attorney of New York County may not be successful in securing a judgment of conviction against Bolger. But that question is not before this Court and was not before the District Court and the Court of Appeals. And the same may be true with respect to the proceedings pending before the Waterfront Commission.

As was said in *Rea* v. *United States*, *supra*, the Court said:

> "• • • The command of the Federal Rules is in no way affected by anything that happens in a State Court • • • "

It would seem therefore that this Court in *Rea* stated they were not concerned with the State prosecution. They were only concerned with the Federal Rules of Criminal Procedure and they will not permit the flouting of these Rules in either federal or state proceedings.

POINT II

The Injunction Does Not Stay the State Prosecution.

The petitioner urges (Brief for petitioner, page 31):

> "The injunction herein against petitioner's testimony in New York's criminal prosecution in effect stays, and has stayed the prosecution. For petitioner's testimony is indispensable to the prosecution and we represent to this Court that, if this injunction stands, New York will be required to dismiss its criminal case against respondent Bolger."

The petitioner, Cleary, is merely a witness in the prosecution pending in New York County against Bolger. The District Attorney of New York County is required by law to conduct all prosecutions for crimes and offenses cognizable by the courts of the county for which he shall have been elected or appointed. (County Law, Section 200, Subd. 4.)

It is not for the petitioner to decide whether his testimony is "indispensable". He cannot act for and make decisions for the District Attorney.

The petitioner, Cleary, is an employee of the Waterfront Commission of New York Harbor, a bi-state agency, with respect to the States of New York and New Jersey. This Commission is not an Agency or Department created by the Legislature of New York State. The Commission, it is true, was set up under the Waterfront Commission Act enacted by the States of New York and New Jersey. (New York Laws, 1953, c. 882, McK. Unconsol. Laws, Sections 6700aa and following; N.J. Laws 1953, c. 203; N.J.S.A. 32:23-1 and following.)

Respondent contends that there is a legal difference between a bi-state agency or department and an agency or department set up by a single state.

Respondent furfher contends that the Waterfront Commission of New York Harbor could not become a legal entity without the Act of Congress. (Act of Congress, August 12, 1953, c. 407, 67 Stat. 541.)

This Act contains all the provisions that are found in the law as enacted by the Legislatures of the States of New York and New Jersey.

An examination of this Act of Congress will reveal that Congress has reserved the right to, "repeal" and "amend" any or all of the provisions.

The petitioner contends that when Congress reserved the right to repeal or amend any provision or all the provisions that this makes the Waterfront Commission of New York Harbor a Federal Agency and as such, this agency is amenable to all the laws of the United States, the Constitution of the United States and also amenable to the Federal Rules of Criminal Procedure.

It therefore follows that Cleary, an employee of the Waterfront Commission of New York Harbor, is amenable

to all of the above laws, rules, and the provisions of the Constitution of the United States.

If this Court agrees that the above is the law then it would not be necessary to answer any other contentions raised in the brief of the petitioner.

The petitioner throughout his brief talks about Section 2283, Title 28, U.S.C.

Petitioner states (Petitioner's brief, page 32):

> " • • • the actual impact of the injunction upon the state court proceedings, rather than the form of the injunction, is perforce controlling under Section 2283. • • • "

Petitioner cites *Hill* v. *Martin*, 296 U.S. 393, 403, and sets forth in his brief an excerpt from that case. In that case this Court said (Petitioner's brief, page 32):

> " • • • It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. • • • It applies alike to action by the court and by its ministerial officers; • • • "

It would seem that this case holds that a Court, or any officers of the Court, cannot be enjoined, unless the case presents facts which bring it within one of the recognized exceptions to Section 2283. The petitioner also cites *Harkrader* v. *Wadley*, 172 U.S. 148, 169 (Petitioner's brief, page 33). It seems that this case talks about officers, attorneys and agents of the State. The petitioner is not an officer, attorney or agent of the State of New York. He is an employee of a bi-state agency.

Petitioner attempts to distinguish *Rea* v. *United States*, *supra*, from this case, in that in the *Rea* case the injunction was clearly ancillary to the prior suppression order and therefore came within the express exception of Section 2283 prohibiting a stay of state court proceedings by a federal court "except * * * where necessary * * * to protect or effectuate its judgments * * * *"

The Court of Appeals (Transcript of Record, pages 41, 42) (Majority opinion) said:

> " * * * Nor can we see any rational justification for holding that the disability from giving testimony in state proceedings, based on the need to protect the integrity of the process stated in the Federal Rules of Criminal Procedure, depends on the existence of a prior federal indictment or suppression order. * * * *"

POINT II-A

Waterfront Commission Is a Bi-state Agency.

As heretofore stated, the petitioner and his attorneys are not State officers. The Waterfront Commission of New York Harbor is a bi-state agency. The Legislature of New York State cannot pass legislation with respect to the Waterfront Commission of New York Harbor that would be legally effective without concurrent action by the Legislature of the State of New Jersey.

With respect to petitioner's Point "B" (Petitioner's brief, page 29) (Paragraph 2) in which he states:

> "Further, upon established principles of administrative law, the instant suit by Bolger to enjoin petitioner's testimony before the Commission is premature since Bolger is required to exhaust his administrative remedies. * * * *"

Respondent's answer to this contention is that he is ready to proceed in the proceedings pending before the Waterfront Commission. The injunction granted against the petitioner is not directed against the Waterfront Commission. They can proceed whenever they are ready. Bolger cannot resort to any remedies he may have until after a hearing and a determination by the Waterfront Commission.

Conclusion

For the aforesaid reasons, it is respectfully submitted that the judgment of the Court of Appeals affirming the judgment of the District Court should be affirmed.

Respectfully submitted,

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Dated:

September, 1962.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 57

MICHAEL CLEARY,

Petitioner,

—v.—

EDWARD BOLGER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN ANSWER TO BRIEF OF NEW YORK DISTRICT ATTORNEYS ASSOCIATION, AMICUS CURIAE

Respondent in answer to Point 1 (page 5) urges that the injunction herein does not restrain a state tribunal.

This brief then goes on to say that in the *Rea* case the injunction:

> " • • • such action was not directed towards the evidence itself, but solely towards federal officers as such. • • • "

The writer of this brief completely overlooks the principle of law that makes any person who aids and abets another in any unlawful acts a principal. There can be no

question that in this case Cleary aided and abetted the federal officers in their (and his) unlawful acts. In *Rea*, the injunction was directed against the evidence and also against the federal officer.

The writer of this brief (page 10) states:

> " • • • The entire case against petitioner in the state court would have been made by the testimony of the federal agent based on the illegal search and the illegally seized evidence. • • •" (Referring to the *Rea* case.)

In the case at bar, there is nothing before this Court, nor was there anything in the Courts below, with respect to whether the State could or could not proceed with the criminal trial pending there. The District Attorney of New York County, who is charged by law with the prosecution of all persons charged with the commission of crimes committed in New York County was not made a party to this action in the District Court. There was a motion made before Judge Bryan for a temporary injunction pending the trial of the action for a permanent injunction. (See Transcript of Record, page 9.) This motion for a temporary injunction contained a stay. The Judge who signed the Order to Show Cause for a temporary injunction struck out the stay on the promise of the United States Attorney that the State would not proceed with the criminal action until the proceedings in the District Court were disposed of.

The District Attorney of New York County had notice of these proceedings in the District Court. He did not intervene. He could have but chose not to. The only one who could decide whether to proceed with the criminal prosecution in New York State is the District Attorney.

The writer of this brief further states (page 12):

"The Rea case, however, did not pronounce a general policy by the federal courts 'of protecting the privacy of the citizen against invasion in violation of the federal rules' * * * "

The respondent does not contend that the *Rea* case made the above finding. He, however, does contend that the *Rea* case holds that federal agents and all persons invited by federal agents to participate in their unlawful activities could be enjoined.

Respondent has not answered other contentions raised in this brief for the reason that he believes they are answered in the main brief.

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 57

MICHAEL CLEARY,

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v.

EDWARD BOLGER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Dated: October, 1962.

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1. In connection with the statement in petitioner's brief (p. 24) that it is problematical whether or not the result at law would actually be adverse to respondent Bolger, especially in the light of this Court's recent decision in *Mapp* v. *Ohio*, 367 U. S. 643, the recent decision by the New York Court of Appeals in *People* v. *Rodriguez*, 11 N. Y. 2d 279, 229 N.Y.S. 2d 353 (1962), is particularly apposite. There, a murder conviction was reversed upon the ground that it is violative of a criminal defendant's rights to interrogate him after arraignment and that therefore the admission of a co-defendant's confession, which had been obtained after the co-defendant's arraignment and which implicated the defendant, required that

the defendant be granted a new trial. Further, it was held as to the defendant who also confessed that, if defendant had confessed as a result of being confronted with evidence obtained as a result of an illegal search and seizure, the *Mapp* rule required the exclusion of such confession from evidence. The New York Court of Appeals specifically held that under *Mapp* the "fruit of poisonous tree" doctrine is applicable to confessions.

2. Respondent Bolger states in his brief that Congress in consenting to the Waterfront Commission Compact reserved the right to repeal or amend the Compact, that this makes the Commission a federal agency, and that this in turn apparently makes petitioner a federal agent for purposes of the Fourth Amendment (this last conclusion is not explicitly spelled out by Bolger).

First, Congress, in approving the Compact (Act of August 12, 1953, 67 Stat. 541, c. 407) did not reserve the right, as asserted by petitioner, to repeal or amend the Compact. Rather, Congress reserved only the right to alter, amend, or repeal the consent given by the Act of August 12, 1953, which is of course a reservation that is markedly different from that asserted by respondent Bolger. In fact, Congress, in its Act of August 12, 1953, approving the Compact, expressly gave its approval to future supplementary *state* legislation in accord with the objectives of the Compact, a "provision in the consent by Congress to a compact . . . so extraordinary as to be unique in the history of compacts". *DeVeau* v. *Braisted*, 363 U. S. 144, 154. Moreover, apart from according its legal consent to the original Compact, the federal government has had no part whatever in the creation, maintenance or operation of the Commission.

The law in any event is established that Congressional consent to an interstate compact does not constitute the agency created thereunder a federal instrumentality.

E.g., *Hinderlider* v. *La Plata River Co.*, 304 U. S. 92 (interstate compact not a treaty or statute of United States within meaning of statute defining this Court's appellate jurisdiction); *Commissioner* v. *Shamberg's Estate*, 144 F. 2d 998 (2nd Cir. 1944), *cert. den.*, 323 U. S. 792 (Port of New York Authority is a "political subdivision" of States of New York and New Jersey within meaning of Revenue Act excluding from taxation the interest on obligations of a state or political subdivision thereof); *State* v. *Murphy*, 36 N. J. 172, 184-187, 175 A. 2d 622, 629-630 (1961) (Waterfront Commission is subject, as a state agency, to the discovery provisions of the New Jersey Rules of Criminal Practice and is therefore required to make available to a criminal defendant a transcript of such defendant's testimony before the Commission).

Respectfully submitted,

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